No. 89-193

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

DISTRICT NO. 1—PACIFIC COAST DISTRICT,
MARINE ENGINEERS' BENEFICIAL ASSOCIATION, and
NATIONAL MARINE ENGINEERS' BENEFICIAL ASSOCIATION,
(AFL-CIO),

Petitioners,

v.

ROBERT N. FINNIE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF CALIFORNIA, FIRST APPELLATE DISTRICT

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QUESTION PRESENTED

Whether, under the preemption doctrine of *San Diego Unions* v. *Garmon*, 359 U.S. 236, and its progeny, a state court has jurisdiction over a suit by a supervisory grievance-adjuster challenging his expulsion from his union for loyalty to his employer where, if the allegations of his state court petition are true, his expulsion would constitute a violation of Section 8(b)(1)(B) of the National Labor Relations Act, and could be annulled by the National Labor Relations Board.

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OPINIONS BELOW

The California Superior Court (City and County of San Francisco) wrote no opinion, but its judgment is reprinted in the Appendix ("App.") at 10a-11a. The unreported opinion of the Court of Appeal of California (First Appellate District, Division Four) reversing that decision is reproduced at App. 1a-9a.

JURISDICTION

On January 19, 1989, the Court of Appeal of California (First Appellate District, Division Four), issued a decision reversing a judgment of the California Superior Court (City and County of San Francisco),

which had dismissed respondent Finnie's action for lack of subject matter jurisdiction. On June 9, 1989, Justice O'Connor entered an Order extending the time for filing this Petition to August 3, 1989. Because the opinion of the California Court of Appeal finally disposed of the federal preemption issue and a reversal here would terminate the state court action, this Court has jurisdiction under 28 U.S.C. § 1257(a). *Belknap, Inc.* v. *Hale*, 463 U.S. 491, 497 n.5 (1983).

STATUTE INVOLVED

This case involves the federal labor law doctrine of "*Garmon*" preemption and the exclusive jurisdiction of the National Labor Relations Board ("NLRB" or "the Board") to adjudicate conduct which arguably constitutes an unfair labor practice under Section 8 of the National Labor Relations Act ("NLRA" or "the Act"). Section 8(b)(1)(B) of the Act, 29 U.S.C. § 158(b)(1)(B), provides:

> It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce . . . (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances.

STATEMENT OF THE CASE [1]

Former MEBA member Robert N. Finnie ("Finnie") brought this action in state court to overturn his expulsion from MEBA.[2] MEBA had expelled Finnie for disobeying the Unions' order to stop working as a supervisory griev-

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[1] The Statement of the Case is drawn from the statement of undisputed facts presented in the trial court, a statement which Finnie agreed was correct in all material respects.

[2] "MEBA" or "the Unions" will be used throughout this petition to refer collectively to the petitioners, District No. 1—Pacific Coast District, Marine Engineers' Beneficial Association, and National Marine Engineers' Beneficial Association, AFL-CIO.

ance-adjuster for an employer with which MEBA had a labor dispute. The nature of the labor dispute, the union trial process and the ensuing court proceedings are described below.

A. Over MEBA's Objection, Finnie Accepts An Offer To Become A Managerial Supervisor

When the events leading to this case arose, Finnie was a member of MEBA, a union which principally represents marine engineers, such as Finnie, who serve aboard ocean-going vessels. In the spring of 1979, Calrice, the owner of a vessel named the VALERIE F, breached its contract with MEBA and discharged the union members manning the vessel, including the VALERIE F's Chief Engineer. At the same time, Calrice entered into a contract covering the vessel with the Masters, Mates & Pilots union ("MM&P"), then a rival of MEBA. Because marine engineers have traditionally been MEBA members, the MM&P could not fill the VALERIE F Chief Engineer vacancy created by the discharge of the VALERIE F's MEBA members, and therefore urged Finnie to take the job.

When Finnie arrived in Jacksonville, Florida in March 1979 to join the VALERIE F, he learned that the MEBA opposed his replacing the previous Chief Engineer, as the Union felt its "vital interests" were at stake in the dispute. MEBA officers advised Finnie that the VALERIE F was a vessel on which MEBA members were not to work until the lockout of MEBA members by Calrice—and the ensuing strike of Calrice by MEBA—was resolved. An MEBA officer directed Finnie to leave the VALERIE F and warned him that if he sailed aboard the ship he would violate the MEBA Constitution, have disciplinary charges filed against him and risk losing his MEBA membership as a result. Finnie ignored MEBA's pleas and warnings and went on board the VALERIE F as Chief Engineer. As Chief Engineer on the VALERIE F, Finnie was a managerial "supervisor," and had the

power to, and did, settle grievances filed by rank-and-file crew members aboard the vessel.

After the vessel arrived in California and while it was being picketed by MEBA, the General Counsel of the National Labor Relations Board issued a complaint against Calrice. A settlement was reached shortly thereafter, under which Calrice agreed to honor the MEBA contract, and to replace the MM&P crew (including Finnie) with an MEBA crew. Finnie's employment was terminated and he was replaced as Chief Engineer.

B. The Unions Discipline Finnie For Serving As Chief Engineer Aboard The VALERIE F

As Finnie had been forewarned, union disciplinary charges were filed against him in June 1979. These charges detailed the encounter between Finnie and the MEBA officials, described Finnie's refusal to comply with their order that he not take the VALERIE F Chief Engineer position, and accused Finnie of having thereby violated "his oath of obligation as a member," as well as applicable provisions of the MEBA Constitution. Even though Finnie concededly had both the time and the money to attend his trial, he deliberately failed to appear at the hearing on the charges. The Trial Committee, after hearing proof, found Finnie guilty and recommended his expulsion. This recommendation was approved by an almost unanimous vote of the entire membership. Finnie was expelled from the Unions in March 1982, after his internal union appeals were denied.

C. Finnie Chooses Not To File NLRB Charges Challenging MEBA's Discipline, And Instead Files A State Court Action

Finnie unsuccessfully appealed his expulsion within MEBA, but chose not to file unfair labor practice charges with the NLRB challenging his expulsion as a violation of § 8(b)(1)(B) of the Act. Finnie instead filed a petition for writ of mandate in the California Superior Court (City and County of San Francisco), which alleged that

the Unions improperly expelled him, and thereby wrongfully interfered with his employment relationships. Finnie's petition sought his reinstatement to the Unions, compensatory damages to remedy the alleged harmful effect of that expulsion on his earnings, and punitive damages.

After Finnie conceded that he was a management grievance-adjuster, the Unions filed a motion to dismiss for lack of subject matter jurisdiction, alleging that Finnie's claim was preempted by federal law. The trial court granted the motion:

> The allegations of the petition, as supplemented by the moving papers on this motion, that petitioner was expelled from respondent unions for refusing to follow their directions to cease working for [Calrice] during said labor dispute and that as a result of said expulsion petitioner was unable to obtain employment and suffered loss of earnings, constitute allegations of conduct arguably in violation of Section 8(b)(1)(B) of the NLRA and arguably within the exclusive jurisdiction of the National Labor Relations Board (NLRB).
>
> Based on the foregoing findings, the court concludes that its jurisdiction is preempted by the NLRA and the NLRB, and that it lacks subject matter jurisdiction of the petition and the alleged cause of action of petitioner. [App. at 11a].

Finnie appealed to the California Court of Appeal (First Appellate District, Division Four), again asserting that his claim was not preempted and should be heard in state court. On January 19, 1989, the Court of Appeal reversed the trial court's dismissal of Finnie's petition, ruling that his allegations were not subject to federal labor law preemption. (App. at 9a). On February 16, 1989, the same court denied MEBA's Petition for Rehearing of the preemption issue. (App. at 12a). The

Unions' subsequent Petition for Review to the California Supreme Court, based on their contention that federal labor law preemption mandated dismissal of Finnie's petition, was denied on April 5, 1989. (App. at 13a).

SUMMARY OF ARGUMENT

This case raises issues of prime importance to employers, labor organizations and to the proper interplay of state and federal administration of the federal labor laws, in the area of the loyalty of managerial employees to their employers. It also presents another instance, often recurring, of attempted evasion of preemption principles[3] by a cause of action cast in a state court mold to disguise its conflict with federal labor laws. This Court should grant review for these reasons, and because the decision below is wholly inconsistent with the labor law preemption doctrine fashioned by this Court to "shield" the system of labor relations "from conflicting regulation of conduct", *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 292 (1971):

1. The California Court of Appeal held that a state court may take jurisdiction over an action, brought by a management grievance-adjuster who was a union member, challenging his expulsion from his union for loyalty to his employer, even though such discipline by a union is arguably forbidden by Section 8(b)(1)(B) of the National Labor Relations Act and therefore within the exclusive jurisdiction of the NLRB. This state court ruling cannot be reconciled with the traditional federal preemption doctrine elucidated by this Court in *San Diego*

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[3] "[I]n referring to decisions holding state laws preempted by the NLRA, care must be taken to distinguish pre-emption based on federal protection of the conduct in question, from that based predominantly on the primary jurisdiction of the National Labor Relations Board, although the two are often not easily separable." *Railroad Trainmen* v. *Terminal Co.*, 394 U.S. 369, 383 n.19 (1969). Here, of course, we address only the second category of preemption.

Unions v. *Garmon*, 359 U.S. 236 (1959), and subsequently reaffirmed in *Iron Workers* v. *Perko*, 373 U.S. 701 (1963), and *Operating Engineers* v. *Jones*, 460 U.S. 669 (1983), to name only the decisions most directly on point.

2. The Court of Appeal's attempt to carve out an "exception" to federal labor law preemption for cases challenging "the manner" in which the union discipline was imposed on a management grievance-adjuster creates an anomaly in the uniform doctrine of federal preemption which is contrary to long-standing precedent of this Court, decisions which have jealously guarded the doctrine from such erosion by lower state courts. Contrary to the Court of Appeal's conclusion, *Machinists* v. *Gonzales*, 356 U.S. 617 (1958), does not support any such "exception". *Gonzales*, decided prior to *Garmon*, involved union discipline of a rank-and-file employee, conduct which was a "peripheral concern" of federal labor law (*Garmon*, 359 U.S. at 243) because it was expressly excepted from federal regulation by a proviso to § 8(b)(1)(A). *Gonzales*, 356 U.S. at 620. By contrast, in Section 8(b)(1)(B), Congress made the expulsion of a management grievance-adjuster like Finnie a central concern of the Act, and empowered the NLRB to afford Finnie a full remedy for his expulsion.

REASONS FOR GRANTING THE WRIT

Introduction

As this Court reiterated in *Operating Engineers* v. *Jones*, 460 U.S. 669 (1983), in order to determine whether a state action may "coexist with the comprehensive amalgam of substantive law and regulatory arrangements that Congress set up in the NLRA to govern labor-management relations", a court must ascertain "whether the conduct that the State seeks to regulate or to make the basis of liability is actually or arguably protected or prohibited by the NLRA". *Id.* at 675-676, citing *San*

Diego Unions v. *Garmon*, 359 U.S. 236, 245 (1959).[4] If the court finds the conduct at issue to be arguably prohibited or protected by the NLRA, "otherwise applicable state law and procedures are ordinarily preempted." *Jones*, 460 U.S. at 676.[5] The state court below conceded that the *Garmon/Jones* preemption rule applied to this case, but concluded that Finnie's petition fell under an exception to that rule. (App. at 5a). In what follows, we show that this case is controlled by *Garmon* and *Jones* and that the "exception" fashioned by the state court misinterprets the precedent upon

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[4] *Garmon* contains the classic formulation of the preemption doctrine:

> When it is clear or may fairly be assumed that the activities which a State purports to regulate * * * constitute an unfair labor practice under § 8 [of the NLRA], due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law. * * * [T]o allow the States to control activities that are potentially subject to federal regulation involves too great a danger of conflict with national labor policy.

Id., 359 U.S. at 244, 246.

[5] The lower court did not follow the preemption analysis mandated by *Jones*. While the court (App. at 8a-9a) correctly noted that "the *Board* must make a factual inquiry whether a union's sanction may adversely affect the employer-representative's performance of collective-bargaining or grievance-adjusting duties before a section 8(b)(1)(B) violation can be sustained" (emphasis added), it erroneously concluded that "[t]he state court need not make any such inquiry in Finnie's case" (*id.*). Where, as here, a defendant raises a subject matter jurisdiction defense based on § 8(b)(1)(B) preemption, the *court* must determine whether the conduct at issue is "arguably" violative of Section 8(b)(1)(B) and thus subject to the Board's exclusive jurisdiction. *See, e.g., Longshoremen* v. *Davis*, 476 U.S. 380, 397 (1986) (in a *Garmon* preemption case, "a court first must decide whether there is an arguable case for preemption; if there is, it must defer to the Board.").

which the court below relied, and frustrates the federal labor policy expressed in Section 8(b)(1)(B) of the Act.

THE OPINION BELOW SQUARELY CONFLICTS WITH THE PREEMPTION DECISIONS OF THIS COURT AND UNDERMINES SECTION 8(b)(1)(B) OF THE NLRA

The NLRB and this Court have established that union discipline of supervisor members who are § 8(b)(1)(B) grievance-adjusters and who refuse to stop working for an employer with which the union has a labor dispute may constitute restraint and coercion of an employer prohibited by § 8(b)(1)(B), even when the union pressure is aimed at the grievance-adjuster rather than the employer. The theory underlying this interpretation is that such coercion indirectly restrains the employer's right to choose and retain a grievance-adjuster. *See American Broadcasting Cos.* v. *Writers Guild*, 437 U.S. 411, 413-418, 421-426, 429-431 (1978) (charging, fining and expelling grievance-adjuster members for working during strike violates § 8(b)(1)(B)). Here, it is undisputed that as the VALERIE F Chief Engineer, Finnie was a Section 8(b)(1)(B) "employer representative for the adjustment of grievances," who had the power to, and did, adjust grievances. Accordingly, Finnie's expulsion for working for an employer with which MEBA had a labor dispute "arguably violated" § 8(b)(1)(B) of the Act. *Writers Guild*, 437 U.S. at 413-418, 421-422.

Writers Guild, combined with an unbroken line of preemption rulings in this Court (most significantly, *Garmon* and *Perko*), makes it plain that the California court erred when it found no preemption in Finnie's case. In *Jones*, the most recent preemption decision on point, this Court found union discipline "arguably violative" of Section 8(b)(1)(B) and the union member's suit preempted under *Garmon*, because the member's state court suit concerned alleged union "interference with

his contractual relationships with his employer." *Id.*, 460 U.S. at 683. Therefore, because Finnie's petition alleged that the union's discipline of him—as a management grievance-adjuster—interfered with his "existing or prospective employment" relationships (*Perko*, 373 U.S. at 705), the Unions' conduct is "arguably prohibited" by Section 8(b)(1)(B) of the Act and within the exclusive purview of the NLRB. Further, as in *Jones*, because the expelled member's state court action involves union discipline which arguably interferes with an employer's Section 8(b)(1)(B) right to select his grievance-adjusters, the state court lacks jurisdiction to entertain the claim. *Id.*, 460 U.S. at 679.

Indeed, on May 21, 1985, the NLRB General Counsel issued a § 8(b)(1)(B) unfair labor practice complaint against MEBA in a virtually identical case involving expelled MEBA member Albert R. Willard, a first assistant engineer employed by the Trinidad Corporation, another employer attempting to drive the MEBA off its vessels. *District No. 1—Pacific Coast District, Marine Engineers' Beneficial Association, AFL-CIO (Trinidad Corporation)*, NLRB Case No. 19-CB-5469.[6] In view of the fact that the NLRB General Counsel saw fit to issue a complaint in *Willard*, there can be no doubt that MEBA's expulsion of Finnie "arguably violated" Section 8(b)(1)(B) of the Act.[7]

Finally, the rule of preemption was "designed to shield the system from conflicting regulation of conduct. *It is the conduct being regulated*, not the formal description of governing legal standards, that is the proper focus of

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[6] The case was subsequently dismissed when Willard withdrew his charges.

[7] *See Hanna Mining* v. *Marine Engineers*, 382 U.S. 181, 192 (1965) (the pronouncements of the General Counsel with respect to "the investigation of charges and issuance of complaints * * * are entitled to great weight.")

concern." *Motor Coach Employees* v. *Lockridge*, 403 U.S. 274, 292 (1971) (emphasis added). *See also, Plumbers' Union* v. *Borden*, 373 U.S. 690, 698 (1963) ("It is not the label affixed to the cause of action under state law that controls the determination of the relationship between state and federal jurisdiction. Rather, [citing *Garmon*], 'our concern is with delimiting *areas of conduct* which must be free from state regulation if national policy is to be left unhampered.' ") (emphasis in opinion). As *Jones* held, "[m]atters within the exclusive jurisdiction of the Board are normally for it, not a state court, to decide. This implements the congressional desire to achieve *uniform* as well as *effective* enforcement of the national labor policy." *Id.*, 460 U.S. at 681 (emphasis in original).[8]

While acknowledging this governing precedent, the California Court of Appeal nonetheless asserted that Finnie's petition centered on his "wrongful expulsion," thereby rendering his case indistinguishable from *Machinists* v. *Gonzales*, 356 U.S. 617 (1958), "because, like *Gonzales*, it involves only matters of internal union discipline." (App. at 4a).[9] The Court of Appeal's reliance

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[8] The timing of Finnie's suit is but one example of the threat his action poses to the uniformity of the federal labor law as regulated by the NLRB. Finnie (for reasons known only to him) chose to wait for over a year after his expulsion became final before filing his lawsuit. Thus, although his action was timely under the applicable four-year California statute of limitations, a Section 8(b)(1)(B) unfair labor practice charge was by then barred by the six-month limitations period of Section 10(b) of the Act. The decision of the state court below would permit a § 8(b)(1)(B) management grievance-adjuster to evade the Section 10(b) statutory command by the simple expedient of casting what is a § 8(b)(1)(B) claim in terms of "improper union disciplinary procedures." This procedural tactic provides an end-run around the federal limitations period and demonstrates the need for preemption.

[9] The California Court of Appeal's failure to recognize the employment-related nature of Finnie's claim may have rested on its erroneous premise that Finnie's allegations against the Unions were focused "solely on disciplinary proceedings against [him]

on *Gonzales*, a pre-*Garmon* decision, is wholly misplaced, for *Garmon* cited the dispute in *Gonzales* as an example of the type of conduct which "was a merely peripheral concern" of federal labor law. *Garmon*, 359 U.S. at 243-244. Accordingly, in *Gonzales*, this Court did not feel compelled to withdraw from the states the power of regulation over the conduct.[10] The *Gonzales* holding rests on the Court's affirmative determination, at the outset of its opinion, that

> the protection of union members in their rights as members from arbitrary conduct by unions and union officers has not been undertaken by federal law, and indeed the assertion of any such power has been expressly denied [by] the proviso to § 8(b)(1) of the Act * * *.

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which were not commenced until after his employment with Calrice had terminated". (App. at 2a). The lower court's assumption that there was no § 8(b)(1)(B) coercion in this case because Finnie no longer worked for Calrice when MEBA disciplined him ignores the fact that the Unions threatened Finnie with discipline, and successfully pressured Calrice to replace him, while he still worked for the company. Both the threat of discipline (*see Writers Guild of America, West, Inc.*, 217 NLRB 957 (1975)), and the direct coercion against Calrice (*see e.g., NLRB* v. *Electrical Workers*, 481 U.S. 573, 590 n.13 (1987)) also were themselves arguable violations of § 8(b)(1)(B). Moreover, Finnie's own petition asserted that as a result of MEBA's discipline of him for violating the Unions' constitution, he was unable to obtain employment in the maritime industry. As *Iron Workers* v. *Perko* holds, this is a classic case of union conduct arguably violative of § 8(b)(1)(B), because "the action here concerned alleged [union] interference with the plaintiff's existing or *prospective* employment relations." *Id.*, 373 U.S. 701, 705 (1963) (emphasis supplied).

[10] Whether *Gonzales* remains good law in an employee (rather than a supervisor) discipline case is an issue left open by *Borden*, 373 U.S. at 697, and questioned by the dissenting opinions in *Lockridge* of Justice Douglas ("I would affirm this judgment on the basis of * * * *Gonzales* * * * rather than overrule it" [403 U.S. at 302]) and Justice White ("[l]ike Mr. Justice Douglas, I would neither overrule nor eviscerate * * * *Gonzales*." [403 U.S. at 309]).

Id., 356 U.S. at 620. The primary concern in *Gonzales*, therefore, was that in the absence of any relevant federal law, the inability of the state courts to assert jurisdiction "would in many cases leave an unjustly ousted member without remedy for the restoration of his important union rights." *Id.* But, whereas Gonzales was a rank-and-file employee, Finnie was a management grievance-adjuster—a supervisor with loyalties to his employer—the discipline of whom Section 8(b)(1)(B) was enacted to regulate and remedy.[11] Thus, contrary to the Court of Appeal's conclusion (App. at 5a), the application of federal preemption principles *is* changed when "the disciplined individual is a supervisor for purposes of the NLRA," for (if he is, as here, also a grievance-adjuster) the dispute is thereby transformed from a strictly internal union matter to a matter involving the union and the employer, which is expressly regulated by Section 8(b)(1)(B).

Finally, in support of its assertion of jurisdiction, the Court below also mistakenly relied on *Sears, Roebuck & Co.* v. *Carpenters*, 436 U.S. 180 (1978), which stated that the "critical inquiry" in a *Garmon* preemption case is "whether the controversy presented to the state court is identical to . . . or different from . . . that which could have been . . . presented to the [NLRB]". (App. at 8a). In *Jones*, however, decided five years after *Sears*, this Court "substantial[ly] reformulat[ed] . . . the 'identical' controversies standard of *Sears*" to hold that state and NLRA claims "are identical if they share an important factual element" or are the same 'in some fundamental

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[11] Indeed, the fundamental purpose of Section 8(b)(1)(B)—a unique statutory provision drafted by Congress to preserve the loyalty of managers to their employers—was to protect management supervisors, like Finnie, who have the power on behalf of management to settle rank-and-file employee grievances. In enacting this provision, Congress sought to insulate such management officials—and *only* such officials—from union discipline for exhibiting loyalty to their employers in the performance of their duties.

respect." *Jones*, 460 U.S. at 682, 688, 689-690.[12] The *Jones* standard compels preemption of Finnie's case, because his petition shares an "important factual element" with the complaint that Finnie could have filed with the NLRB.[13]

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[12] The distinction drawn by the California Court of Appeal (App. at 2a) between challenging a union's "right" to discipline a member and attacking the "manner" in which the discipline is imposed, is a distinction without a difference for § 8(b)(1)(B) preemption purposes. The statute nowhere states (and no case holds) that unions may discipline supervisory grievance-adjusters (and thereby coerce or restrain employers) so long as the disciplinary procedures used comply with the union's constitution and due process. Instead, as every Section 8(b)(1)(B) case finding an unfair labor practice (or holding a state court action preempted as challenging conduct "arguably violative" of that Section) shows, unions are routinely held to violate the Act whether or not a claim is made that the disciplinary procedures followed were improper.

In this connection, we note that Finnie cannot manufacture state court jurisdiction over the "manner" of his discipline by "conceding" that the Unions had the "right" to discipline him and thereby waive his Section 8(b)(1)(B) remedy and displace the exclusive jurisdiction of the NLRB. *Jones*, 460 U.S. at 680-681.

[13] In his petition, Finnie alleged that MEBA's expulsion "substantially impaired * * * his ability to obtain employment in his profession as a marine engineer," by depriving him of his use of the union's hiring hall, causing him to lose work and resulting in the loss of past and future earnings. The same allegations would have formed a "crucial element" of Finnie's NLRB case. *Jones*, 460 U.S. at 682. *See also, Perko*, 373 U.S. at 705, 706-707 and *Borden*, 373 U.S. at 694.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: August 3, 1989

APPENDIX

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IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

A037274

Super. Ct. No. 780847
(San Francisco County)

ROBERT N. FINNIE,
Appellant,

v.

DISTRICT NO. 1—PACIFIC COAST DISTRICT/
MARINE ENGINEERS' BENEFICIAL ASSOCIATION, et al.,
Respondents.

[Filed Jan. 19, 1989]

Robert N. Finnie (Finnie) appeals from the judgment dismissing his petition for writ of mandate against District No. 1—Pacific Coast District, Marine Engineers Beneficial Association and National Marine Engineers Beneficial Association (AFL-CIO) (collectively, the unions) for lack of subject matter jurisdiction. Finnie's claims are based on his expulsion from the unions. His petition alleges that the unions failed to follow their constitutions and bylaws in the proceedings leading to his expulsion, and that the unions' disciplinary procedures violated his right to due process under California law. The trial court determined that the petition is preempted

by the National Labor Relations Act (29 U.S.C. § 151, et seq., hereinafter NLRA) because it alleges conduct on the part of the unions arguably constituting an unfair labor practice under section 8 (b) (1) (B) of the NLRA (29 U.S.C. § 158 (b) (1) (B), hereinafter section 8 (b) (1) (B)). We find grounds for such preemption lacking in Finnie's circumstances and therefore reverse.

An extended discussion of the events that lead the unions to discipline Finnie is unwarranted because he concedes that the unions had the right to discipline him and complains only of the manner in which he was disciplined. The record indicates that Finnie, a marine engineer, failed to follow the unions' directive and proceeded to work on board a ship, the Valerie F, at a time when the unions were involved in a dispute with the shipowner, Calrice Transport, Inc. For present purposes, the conduct for which Finnie was disciplined may be characterized as crossing a picket line and working during a strike. He signed off the ship after one voyage. The unions state that they successfully pressured Calrice to replace Finnie. Finnie claims that he never intended to continue working for Calrice after the voyage, and that he voluntarily left the ship to work for another employer. We need not determine which version of the facts is correct because the petition is focused solely on disciplinary proceedings against Finnie which were not commenced until after his employment with Calrice had terminated. It is undisputed that Finnie had the power to adjust grievances of employeers aboard the Valerie F, and that he was a "supervisor" for purposes of the NLRA when he worked for Calrice.

Finnie's petition alleges that the unions' disciplinary procedures violated his rights in at least eleven respects. Finnie, a resident of Marin County, claims that he was victimized by the "personal vendetta" of a New Orleans union official, who "bent and twisted" the unions' rules to guarantee that his disciplinary proceedings would be

"nothing more than a kangaroo court." Certain of the more egregious charges may be outlined as follows. Finnie was entitled under the union constitution and bylaws to a trial in San Francisco, but the trial was held in New Orleans so that he would be unable to appear in his defense. He was tried in absentia and without the benefit of counsel because the unions required that his attorney be a licensed marine engineer and he could locate no such individual. He was not notified of the hearing on his union appeal until after the hearing was over and the appeal had been denied.

Finnie's theory is that apart from these and other procedural irregularities his punishment might have been less severe and he acknowledges that, if he prevails on his petition, the unions will have the right to re-try his case. (See *Taylor* v. *Marine Cooks & Stewards Assn.* (1953) 117 Cal.App.2d 556, 565.) In addition to reinstatement, he is seeking to recover for lost earnings and emotional distress occasioned by his loss of union membership, along with punitive damages.

The unions have already twice argued unsuccessfully that Finnie's claims are within the ambit of federal law. They first sought to remove the case to federal court, alleging that Finnie's suit was for violation of contracts between labor organizations within the meaning of section 301 (a) of the Taft-Hartley Act (29 U.S.C. § 185 (a)). District Judge Orrick determined that "[t]he action was properly brought in the state courts on a state cause of action," held that federal jurisdiction was lacking and remanded the case back to the superior court. (*Finnie* v. *District No. 1—Pacific Coast Dist., etc.* (N.D. Cal. 1981) 538 F.Supp. 455, 460.) The unions then asked the superior court to rule that Finnie's claims were governed by federal, rather than state labor precedents. Judge Pollak determined that Finnie's claims were "properly maintainable under California law," noting that "in the absence of a clearer indication of federal preemption,

[they] should be viewed as coming within long-established principles of state law, particularly in light of the history of this particular litigation."

Similar reasoning applies to the present claim of preemption under section 8 (b) (1) (B). We think that a finding of preemption would be somewhat anomalous at this stage of the case, after Finnie has twice been told that his claims are cognizable under California law. More importantly, portions of Judge Orrick's discussion are equally applicable here. His opinion notes that Finnie's dispute, "which involves the question of whether a union's internal disciplinary procedures violate the due process guarantees of the union's constitution, is one which a court can decide by simply focusing upon the union's constitution and by-laws. [Citing *Motor Coach Employees* v. *Lockridge* (1971) 403 U.S. 274, 296.] There exist no issues of potentially significant impact upon national labor policy requiring federal rather than state decision. In *International Association of Machinists* v. *Gonzales*, 356 U.S. 617, 78 S.Ct. 923, 2 L.Ed.2d 1018 (1958), the Supreme Court held that state court jurisdiction was not preempted in a suit against a labor union by an individual who claimed he had been wrongfully expelled in violation of his contractual rights . . . . *Gonzales* is still valid precedent . . . to the extent that it suggests that disputes over purely internal union disciplinary matters, like the expulsion proceedings challenged in that case, are beyond the pale of federal preemption." (*Finnie* v. *District No. 1—Pacific Coast Dist., Etc., supra*, 538 F.Supp. at pp. 459-460.) We find that there is no preemption in Finnie's case because, like *Gonzales*, it involves only matters of internal union discipline.

"Congress has never developed a comprehensive and impliedly exclusive plan of federal regulation for union-member relations . . . . in contrast to the balance struck by Congress in labor-management relations which normally requires the exclusion of additional state rights or

remedies, in dealing with the rights of a union and its members, Congress acted interstitially to supplement state law." (Cox, *Labor Law Preemption Revisited* (1972) 85 Harv.L.Rev. 1337, 1372-1373, citing 29 U.S.C. §§ 413, 523 (a).) Thus, wrongful union discipline claims have been determined by California courts under California law both before and after the United States Supreme Court's landmark decision in *San Diego Unions* v. *Garmon* (1959) 359 U.S. 236, setting forth the doctrine of federal preemption in situations where a state purports to regulate activities constituting unfair labor practices under the NLRA. (See *Cason* v. *Glass Bottle Blowers Assn.* (1951) 37 Cal.2d 134; and *Posner* v. *Utility Workers Union of America* (1975) 47 Cal.App.3d 970.) Claims of wrongful expulsion from union membership are excepted from preemption under *Garmon* because the activities involved are viewed as a " 'merely peripheral concern' " of the NLRA touching interests " 'deeply rooted in local feeling and responsibility.' " (*Farmer* v. *Carpenters* (1977) 430 U.S. 290, 296-297, citing *Gonzales, supra.*) In the words of a leading commentator, "where the conflict is between a labor organization and its individual members, the danger of upsetting a federally-struck balance is so slight that there is no need for preemption." (Cox, *supra*, 85 Harv.L. Rev. at p. 1339.) Based on the following discussion, we conclude that the result dictated by the foregoing principles is not changed simply because the disciplined individual is a supervisor for purposes of the NLRA.

The transcript of the hearing on the unions' motion to dismiss suggests that the trial court was pursuaded in favor of preemption by the decision in *American Broadcasting Cos.* v. *Writers Guild* (1978) 437 U.S. 411. This case indicates that a union may commit an unfair labor practice under section 8 (b) (1) (B) when it disciplines a supervisor for crossing the union's picket line to per-

form supervisory work during a strike.[1] In determining whether union discipline restrains or coerces the employer within the meaning of section 8 (b) (1) (B), the NLRB must "inquire whether the sanction may adversely affect the supervisor's performance of his collective-bargaining or grievance-adjustment tasks." (*Id.* at p. 430.) The *ABC* court determined that the NLRB had addressed those issues and sustained its finding that the Guild violated section 8 (b) (1) (B) by disciplining producers, directors and story editors (known as "hyphenates") who crossed picket lines to work for the networks during a writers' strike.

In deciding whether the Guild had the *right* to discipline the hyphenates, the *ABC* court had no occasion to consider the *manner* in which the discipline was imposed. Since the union's disciplinary procedures were not at issue in *ABC*, that case is not controlling with respect to Finnie's claims. The other case upon which the unions chiefly rely, *Writers' Guild of America West, Inc.* v. *Superior Court* (1975) 53 Cal.App.3d 468, is inapposite for the same reason. In *Writer's Guild*, which involved the same strike as *ABC*, the hyphenates sought damages from the Guild on the theory that the Guild's constitution and bylaws did not prohibit the conduct giving rise to their discipine. On the basis of *Hill* v. *United Brotherhood of Carpenter etc. of America, Local 25* (1975) 49 Cal.App.3d 614, which was later reversed in *Farmer* v. *Carpenters, supra*, the court determined that the hyphenates' claim was preempted. Assuming, *arguendo*, that

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[1] Section 8(b)(1)(B) provides that "[i]t shall be an unfair labor practice for a labor organization . . . to restrain or coerce . . . an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." Such coercion may include not only direct union pressure on the employer, but also pressure aimed at the grievance adjuster, on the theory that it indirectly affects the employer's right to choose and retain a grievance adjuster. (See *Plumbers, Local No. 364* (1981) 254 NLRB 1123, 1125.)

Writer's Guild remains good law notwithstanding *Farmer* v. *Carpenters*, it is distinguishable because the hyphenates, unlike Finnie, did not claim that they were denied notice, opportunity to prepare or a full hearing. (*Writer's Guild*, *supra*, 53 Cal.App.3d at p. 476.) Again, the union's right to discipline the hyphenates, not the manner of their discipline, was at stake.

Other United States Supreme Court authorities cited by the unions only serve to reinforce our conclusion that Finnie's claims are not preempted. Preemption will be found where the "crux" of the action is the union's wrongful interference with a member supervisor's employment, rather than wrongful expulsion from the union. (*Iron Workers* v. *Perko* (1963) 373 U.S. 701, 705; see also *Motor Coach Employees* v. *Lockridge*, *supra*, 403 U.S. at p. 296 [distinguishing *Gonzales* on the basis that "Lockridge's cause of action and claim for damages were based solely upon the procurement of his discharge from employment"]; and *Operating Engineers* v. *Jones* (1983) 460 U.S. 669 [complaint claiming union interference with employment contract].) Since the "crux" of Finnie's petition is wrongful expulsion, his case cannot be distinguished from that of *Gonzales*.

The unions suggest that *Gonzales* is distinguishable because the case involved a rank and file employee rather than a supervisory grievance adjuster. They contend that since the NLRB may order reinstatement of a supervisor, a remedy unavailable to Gonzales as a rank and file union member, the result in *Gonzales* was "dictated" by considerations of judicial economy. But the finding that Gonzales' claim was not within the NLRB's exclusive jurisdiction did not turn on the Board's remedial powers. "The *Gonzales* decision, it is evident, turned on the Court's conclusion that the lawsuit was focused on purely internal union matters, i.e., on relations between the individual plaintiff and the union not having to do *directly* with matters of employment, and that the prin-

cipal relief sought was restoration of union membership rights." (*Plumbers' Union* v. *Borden* (1963) 373 U.S. 690, 697.) (Emphasis added.) The same statement is true of Finnie's case, and it disposes of the unions' additional argument that *any* discipline of supervisors "connected with their employment" is a violation of section 8 (b) (1) (B). Although Finnie's decision to work during a strike, a "matter of employment," caused the unions to commence disciplinary proceedings, the reason for the discipline is not at issue. The procedural malfeasance of which Finnie complains is unconnected with his employment except as an element of damages, and "[i]n this posture [speaking of *Gonzales*], collateral relief in the form of consequential damages for loss of employment was not to be denied." (*Ibid.*; see also Cox, *supra*, 85 Harv.L.Rev. at p. 1374 ["Allowing a judicial tribunal to award damages for loss of employment following wrongful expulsion from membership poses no significant threat to national labor policy"].) Finnie's petition is not preempted because it is only "indirectly" concerned with matters of employment.

We note finally that our conclusion follows from analysis of the preemption issue in accordance with the factors outlined in *Farmer* v. *Carpenters*, *supra*, and *Sears, Roebuck & Co.* v. *Carpenters* (1978) 436 U.S. 180. We must "determine the scope of the general [preemption] rule by examining the state interests in regulating the conduct in question and the potential for interference with the federal regulatory scheme." (*Farmer*, *supra*, 430 U.S. at p. 297.) In analyzing the potential for interference, "[t]he critical inquiry . . . [is] whether the controversy presented to the state court is identical to . . . or different from . . . that which could have been . . . presented to the [NLRB]." (*Sears, Roebuck & Co.*, *supra*, 436 U.S. at p. 197.) As previously indicated, the "Board must make a factual inquiry whether a union's sanction may adversely affect the employer-representative's performance of collective-bargaining or grievance-

adjusting duties before a section 8 (b) (1) (B) violation can be sustained." (*NLRB* v. *Electrical Workers* (1987) 481 U.S. 573 [95 L.Ed.2d 557, 571] [describing the "crux" of the holding in *ABC*].) The state court need not make any such inquiry in Finnie's case; it must only determine whether the unions disciplined Finnie in accordance with their own internal rules and the requirements of due process. In this regard, it is noted that "[t]he fairness of an internal union disciplinary proceeding is hardly a question beyond 'the conventional experience of judges,' nor can it be said to raise issues 'within the special competence' of the NLRB." (*Boilermakers* v. *Hardeman* (1971) 401 U.S. 233, 238-239.) The potential for interference with federal labor regulation is slight in Finnie's case. (*Farmer, supra,* 430 U.S. at pp. 296-297; Cox, *supra,* 85 Harv.L.Rev. at p. 1339.)

California's interest in protecting its citizens from unfair treatment by a national organization also favors Finnie. If he was in fact sanctioned by a kangaroo court in a distant forum, then he is entitled to redress under the laws of this state. "Where the state interest is great and the risk of interference small, 'inflexible application of the [preemption] doctrine is to be avoided.'" (*Rodriguez* v. *Yellow Cab Cooperative, Inc.* (December 15, 1988, A037738)—Cal.App.3d —, quoting *Farmer, supra.*)

The judgment of dismissal is reversed.

PERLEY, J.

We Concur:

ANDERSON, P.J.

POCHE, J.

SUPERIOR COURT OF THE
STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO

No. 780-847

ROBERT N. FINNIE,

Petitioner,

vs.

DISTRICT NO. 1—PACIFIC COAST DISTRICT, MARINE ENGINEERS' BENEFICIAL ASSOCIATION, and NATIONAL MARINE ENGINEERS' BENEFICIAL ASSOCIATION (AFL-CIO),

Respondents.

JUDGMENT DISMISSING PETITION FOR LACK OF SUBJECT MATTER JURISDICTION

The motion of respondents to dismiss the within action for the court's lack of subject matter jurisdiction came on for hearing before the above-entitled court on October 21, 1986. Petitioner and respondents appeared by their respective attorneys. The court has considered all of the moving papers of both sides on this motion, including the memoranda, declarations, and stipulations concerning the facts, the original petition filed by petitioner in this action, and the arguments of counsel. Based on the foregoing, the court makes the following findings:

1. It is undisputed that California Rice Transport, Inc., (Cal Rice), the employer of petitioner at the time of the labor dispute described in the petition, was engaged in interstate commerce and in operations affecting commerce within the meaning of the National Labor Relations Act (NLRA), and that respondents at said time were labor organizations whose members were employed in operations affecting commerce within the meaning of the NLRA.

2. It is undisputed that at said time petitioner was employed by California Rice Transport, Inc. as a supervisor and grievance adjuster within the meaning of Section 8(b)(1)(B) of the NLRA.

3. The allegations of the petition, as supplemented by the moving papers on this motion, that petitioner was expelled from respondent unions for refusing to follow their directions to cease working for Cal Rice during said labor dispute and that as a result of said expulsion petitioner was unable to obtain employment and suffered loss of earnings, constitute allegations of conduct arguably in violation of Section 8(b)(1)(B) of the NLRA and arguably within the exclusive jurisdiction of the National Labor Relations Board (NLRB).

Based on the foregoing findings, the court concludes that its jurisdiction is preempted by the NLRA and the NLRB, and that it lacks subject matter jurisdiction of the petition and the alleged cause of action of petitioner. Accordingly,

IT IS ORDERED that respondents' motion to dismiss the petition on the ground that the court lacks subject matter jurisdiction thereof be, and it is hereby, granted.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the petition be, and it is hereby, dismissed on the aforesaid ground, with respondents to have their costs of suit.

DATED: October —, 1986

LUCY KELLY MCCABE
Judge of the Superior Court

Approved as to form:

CARTWRIGHT, SUCHERMAN & SLOBODIN, INC.

By _____
DENNIS KRUSZYNSKI

COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE FIRST APPELLATE DISTRICT DIVISION: 4

A037274

San Francisco County No. 780847

FINNIE, ROBERT N.

vs.

DIST. NO. 1—PACIFIC COAST DIST., *et al.*

BY THE COURT:

The petition for rehearing is denied.

Dated: Feb. 16, 1989

ANDERSON
P.J.

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA
1st District
Division 4

IN BANK

No. A037274, S009140

ROBERT N. FINNIE

v.

DISTRICT NO. 1 PACIFIC COAST DISTRICT/MARINE, ETC., *et al.*

ORDER DENYING REVIEW
AFTER JUDGMENT BY THE COURT OF APPEAL

[Filed Apr. 5, 1989]

Respondents' petition for review DENIED.

LUCAS
Chief Justice

No. 89-193

(2)

In The

Supreme Court of the United States

October Term, 1989

DISTRICT NO. 1—PACIFIC COAST DISTRICT, MARINE ENGINEERS' BENEFICIAL ASSOCIATION, AND NATIONAL MARINE ENGINEERS' BENEFICIAL ASSOCIATION (AFL-CIO),

Petitioners,

v.

ROBERT N. FINNIE,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DENNIS KRUSZYNSKI
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QUESTION PRESENTED

Respondent Finnie takes strong exception to the deceptive and self-serving manner in which petitioner Union framed the "Question Presented" in its petition. Union framed the question in such a loaded manner that, as phrased, the answer could be nothing other than an answer in Union's favor.

Union posed the question as being whether there would be NLRB preemption over an action by a supervisory grievance adjuster challenging his expulsion from his union where, *"....if the allegations of his state court petition are true, his expulsion would constitute a violation of Section 8(b)(1)(B) of the National Labor Relations Act...."* If it were a factual and legal "given" that his expulsion constituted an unfair labor practice in violation of Section 8(b)(1)(B), there is no answer other than but the NLRB has preemptive jurisdiction. Finnie has never contended otherwise.

The very question at issue in this case is and always has been *whether, under the facts of Finnie's particular case, the union's expulsion of him did or did not arguably constitute an unfair labor practice in violation of Section 8(b)(1)(B)*, thereby mandating NLRB preemption. By virtue of the loaded manner of its phrasing of the question purportedly presented, Union has incorporated within that phrasing a presumptive answer (favorable to the Union) to the very question which is at issue in this petition for writ of certiorari, namely, whether his discipline was in fact even arguably a Section 8(b)(1)(B) unfair labor practice therefore mandating NLRB preemption of his action.

All of the litigation below centered on the issue of whether (as Union contends) this Court's decisions have

QUESTION PRESENTED (continued)

established a "bright line rule" that union discipline of a supervisory grievance-adjuster is automatically always a prohibited unfair labor practice and therefore preempted by the NLRB, or whether (as Finnie contends) this Court's decisions have established two additional requirements — that the discipline must have actually coerced or restrained the employer in its selection of the supervisor and that the discipline must have been for conduct related to the performance of the supervisor's Section 8(b)(1)(B) duties — before unfair labor practice preemption will be found. Finnie has contended throughout this litigation that neither of those two requirements are present in his case and therefore the union's act of disciplining him did not constitute an unfair labor practice mandating NLRB preemption.

Accordingly, Finnie submits that a more accurate and truthful phrasing of the question presented is as follows:

> **"Is it always a preempted unfair labor practice under Section 8(b)(1)(B) for a union to discipline a member with supervisory grievance-adjustment duties, even where the facts of the particular case are (1) that the discipline was for conduct wholly unrelated to the performance of those grievance-adjustment duties, and (2) that the disciplinary proceedings were commenced and the discipline imposed long after the member had already left the employ of the particular employer, and (3) that the member left the employ of the employer for reasons wholly unrelated to either the threat of discipline or the fact of discipline?"**

PARTIES

The parties to this Petition for Writ of Certiorari are the same as the parties to all proceedings below.

Petitioners *District No. 1* — Pacific Coast District, Marine Engineers' Beneficial Association, and National Marine Engineers' Beneficial Association (AFL-CIO) are respectively a parent union and its regional subsidiary. Throughout this litigation both sides have treated them collectively as a single entity denominated "the Union" (or sometimes "MEBA"), and for purposes of this litigation the parties have agreed their separate legal status is not relevant. This Union represents marine engineers on domestic and oceangoing vessels, and it is without dispute that the overwhelming majority of available marine engineer positions in the USA are under exclusive contract to this Union.

Respondent *Robert N. Finnie* is a marine engineer who was a member of respondent Union until his expulsion by the Union. His expulsion was initially effected at the union trial committee level in 1979; however, it did not become final until 1982 after he had made unsuccessful internal administrative appeals to the Union's intermediate governing body and subsequently to its national governing body.

In the state court action, Finnie brought an action for writ of mandamus alleging that his discipline had been performed in a manner violative of due process. He sought a writ of mandate compelling his reinstatement together with incidental damages for lost income opportunities due to loss of his union membership. Finnie in his

PARTIES (CONTINUED)

state court action always acknowledged that once he was reinstated, there was nothing to prevent the union from reinstituting disciplinary proceedings provided they did so in a manner which afforded him due process.

In the state court action below, Finnie was denominated "Petitioner" and the Union was denominated "Respondents".

In order to avoid confusion due to the reversed denominations in the instant certiorari proceeding, Finnie in this brief will simply refer to himself as "Finnie" and will refer to the Union as "Union".

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APPENDIX:

TABLE OF AUTHORITIES

REASONS FOR DENYING THE WRIT

A. The result below (i.e. the finding of nonpreemption) does not conflict with the decisions of this Court.

The only arguable basis for granting the writ is the criteria contained in Supreme Court Rule 17.1(c), namely, that the state court "has decided a federal question in a way in conflict with applicable decisions of this Court."

It is the Union's contention that this Court's decisions have established a "bright line" rule that any attempt to discipline a supervisor-member who has grievance adjusting duties is automatically a prohibited unfair labor practice under Section 8(b)(1)(B) of the National Labor Relations Act (29 USC 158(b)(1)(B)), and is therefore preempted by the NLRB under the preemption rule of *San Diego Unions v. Garmon*, 359 U.S. 236 (1959). In this regard they rely principally on *Iron Workers v. Perko*, 373 U.S. 701 (1963), *Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971), *ABC v. Writers Guild West*, 437 U.S. 411 (1978), and *Operating Engineers v. Jones*, (1983), 460 U.S. 669. They argue that their discipline of Finnie was therefore a prohibited 8(b)(1)(B) activity and thus preempted.[1]

It is Finnie's contention that the *result* reached below, if not the reasoning, is correct under the decisions of this

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[1] The Union here is in the rather anomalous position of arguing that it committed an illegal and prohibited act in disciplining Finnie at all, an act prohibited under Section 8(b)(1)(B). The Union's motives here are obvious. During the first six years of this litigation from 1981 to 1986 it never asserted NLRB preemption. In 1986, when the six-month statute of limitations had long since passed for bringing an action in the NLRB, they asserted such preemption for the first time, knowing full well that if they prevail Finnie will be left remedyless in any forum. The Union appears willing to argue anything at any time, even that it committed a prohibited illegal act, if it will suit its immediate strategic purpose.

Court, and that there is no conflict with this Court's decisions justifying the granting of certiorari. In this regard Finnie relies principally on *Florida Power & Light v. Electrical Workers*, 417 U.S. 798 (1974), *ABC v. Writers Guild West*, 437 U.S. 411 (1978), and *NLRB v. Electrical Workers Local #340*, 481 U.S. 573 (1987).[2] As we understand the teachings of this Court in those cases, there is no inflexible "bright line" rule automatically mandating NLRB preemption of every action involving discipline of a supervisor-member who performs Section 8(b)(1)(B) duties. Rather, as we understand those decisions, discipline of a supervisor-member constitutes a preempted unfair labor practice only where (1) there is an express finding that the discipline was for conduct involving the performance of Section 8(b)(1)(B) duties such as grievance adjustment, and not for unrelated conduct, and (2) where there is an express finding that under the particular facts of the case, there was a genuine probability that discipline would result in *actual* restraint or coercion upon the employer in the selection of its supervisory employees, and not merely some sort of potential, hypothetical, or theoretical restraint or coercion.

The record demonstrates that neither condition was present in Finnie's case. In Finnie's case the discipline was for conduct wholly unrelated to the performance of his Section 8(b)(1)(B) grievance adjusting duties. Moreover, since the disciplinary proceedings were not even commenced until after he had long since resigned from this employer for personal reasons wholly unrelated to the events giving rise to his discipline, the discipline did not and could not have been designed to coerce or restrain the employer in its selection of Finnie, nor could it have possibly had such an effect.

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[2] Both the Union and Finnie rely on *ABC v. Writers Guild West* in support of their respective positions.

It is Finnie's position therefore that the Court of Appeal reached the correct result in finding nonpreemption here, and that such result is full consonance with this Court's applicable decisions. Since the result is not in conflict with this Court's decision, certiorari should be denied.

B. Even if the reasoning in the unpublished opinion below was erroneous, that would not justify the granting of certiorari if the end result was correct.

It must be emphasized that the California Court of Appeal decision from which this writ is taken is an *unpublished decision.* Therefore, it is without precedential value whatever outside the four corners of this action.

While this fact alone would not justify denial of certiorari if in fact the *result* arrived at (i.e. the finding of nonpreemption) were contrary to decisions of this Court, if this Court believes that the result was correct even if the reasoning was not, then the fact that this was an unpublished decision should militate strongly against a grant of certiorari.

We will be very candid: we do not agree with the reasoning of the California Court of Appeal and we believe that although the result was correct, the reasoning was erroneous. The grounds asserted by the Court of Appeal for reaching the result it reached were *not* the grounds asserted by Finnie in his briefs below. The Court of Appeal, in devising its "exception" to the *Garmon* rule (i.e. that there is no preemption of supervisor discipline in cases in which it is the manner of discipline rather than the right to discipline which is being challenged), devised this position sua sponte and Finnie never urged such a theory in his briefs. In fact, we agree with the Union in several of its criticisms of the Court of Appeal's reasoning as contained in its unpublished opinion, and we therefore

will not defend that reasoning but rather defend only the result.[3]

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[3] The Court of Appeal below said that *ABC v. Writers Guild West,* 437 U.S. 411 (1978), was not controlling in Finnie's case because "In deciding whether the Guild had the *right* to discipline the hyphenates, the *ABC* court had no occasion to consider the *manner* in which the discipline was imposed. Since the union's disciplinary procedures were not at issue in *ABC,* that case is not controlling with respect to Finnie's claims." (See opinion, at page 6a of Appendix to Union's brief.) We are compelled to agree with the Union that this interpretation *ABC* is in fact a clearly erroneous one, and if this were a *published* opinion a grant of certiorari would be justified. However, we believe that the result is nonetheless correct under *ABC,* but for different reasons. What we actually argued below, as we argue in this brief, is that *ABC* requires a finding that that discipline was for conduct involving the performance of Section 8(b)(1)(B) duties and not for unrelated conduct, and also a finding that the discipline had an actual rather than merely hypothetical chilling effect on the employer's freedom to select its representatives. Since neither such finding was or could be made in under the particular facts of Finnie's case, under *ABC* a finding of preemption was not justified. Therefore, a correct result was reached albeit for wrong reasons.

Likewise, we disagree with the reasoning of the Court of Appeal when, in addressing this Court's well-established rule that "the Board must make a factual inquiry whether a union's sanction may adversely affect the employer-representative's performance of collective-bargaining or grievance-adjusting duties before a section 8(b)(1)(B) violation can be sustained", it nevertheless concluded that "The state court need not make any such inquiry in Finnie's case; it must only determine whether the unions disciplined Finnie in accordance with their own internal rules and the requirements of due process." (See opinion, at pages 8a-9a of Appendix to Union's brief.) We agree with the Union that this is an indefensible position in conflict with this Court's decisions, and again, if this were a *published* opinion a grant of certiorari would be justified. What we in fact argued below was that a state court, when faced with a preemption claim, must in fact make precisely the same inquiry as the Board would make had the action been initiated before the NLRB, i.e. whether the sanction in fact actually adversely affects the employer-representative's performance of his supervisory duties. As can be seen from the transcript of the trial court's hearing at which it found preemption (see *Exhibit D* attached hereto), we had urged that the court undertake precisely such inquiry and urged that under the facts of Finnie's case such inquiry would demonstrate the absence of such adverse impact. On this issue, we again believe that the Court of Appeal reached the correct result but for the wrong reasons.

However, if this Court is convinced for the reasons stated herein that the *result* below was correct, then it should deny certiorari, since however erroneous the reasoning below it was unpublished and therefore has no precedential value.

Because the legal determination of the preemption issue is greatly dependent upon an understanding of what the true facts of Finnie's case were, we will now correct what we perceive to be inaccuracies in the Union's factual statement of the case.

STATEMENT OF MATERIAL FACTS WHICH WERE MISSTATED OR OMITTED BY UNION IN ITS PETITION FOR WRIT OF CERTIORARI.

A. Introduction.

The union in its "Statement of the Case" has either misstated or omitted crucial facts which are essential to the preemption issue.[4]

In summary, we agree with the Union that the Court of Appeal was wrong to inject the distinction between manner-of-discipline vs. right-to-discipline into the determination of whether there is preemption. The decision on preemption must be made independent of that distinction. Such a distinction becomes relevant only *after* the preemption determination has been made: if the matter is deemed preempted, then it becomes a right-to-discipline action cognizable before the NLRB; if the matter is deemed not preempted, then it becomes a manner-of-discipline action cognizable in the state court.

[4] In the Union's "Statement of the Case", the Union states at page 2, "The Statement of the Case is drawn from the statement of undisputed facts presented in the trial court, a statement which Finnie agreed was correct in all material respects." We must point out that this is just not true. In the trial court below, after the Union had submitted a purported "Statement of Undisputed Facts" in support of its motion to dismiss containing substantially the same mischaracterizations as are contained in its instant brief, Finnie responded by filing an opposition to the motion which included a "Statement of Agreement or Disagreement With

Since Finnie's legal contention is that neither of the conditions necessary for preemption was present in his case (namely, that there be at least an arguable showing that the discipline resulted in actual restraint or coercion upon the employer, and that there be a showing that the supervisor-member was disciplined for conduct involving his Section 8(b)(1)(B) grievance adjustment duties and not for unrelated conduct), it is crucial that a correct statement of the facts be before this Court.

Finnie was disciplined for disobeying a Union official's order to get off a ship that was the subject of a jurisdictional labor dispute. In his state action Finnie did not challenge the right of the union to discipline him, but only its manner. Finnie's state petition alleges that the disciplinary proceedings resulting in his expulsion were undertaken in a manner so violative of his due process as to amount to a kangaroo court.[5] The remedy he sought was reinstatement (although he has always acknowledged that the union could re-try him after reinstatement, provided they did it in a fair manner). He sought emotional distress damages and punitive damages, as well as

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Respondent's Statement of Undisputed Facts" (a copy of which is attached hereto as *Exhibit C*) and a "Declaration of Robert N. Finnie" controverting certain of the Union's purportedly uncontroverted facts (a copy of which is attached hereto as *Exhibit B*). (Those exhibits, as well as all of the other exhibits contained in the Appendix to this brief, were part of the record on appeal below.) An examination of those documents shows material disagreements with a number of the Union's factual assertions.

[5] Attached hereto as *Exhibit A* are relevant excerpts from Finnie's "Petition for Writ of Mandate" filed in the state court on May 28, 1981. We have not attached verbatim the entire petition due to its length of 53 pages, but will be pleased to provide it if requested.

incidental damages for lost earning opportunities due to loss of his union membership.[6]

The Union's contends that this Court has established, in *San Diego Unions v. Garmon*, 359 U.S. 236 (1959), and subsequent decisions, interpreting it, a "bright line" rule which might be characterized as follows:

> *"Union discipline of a supervisor-member with grievance adjustment duties is always a fortiori a prohibited unfair labor practice under Section 8(b)(1)(B) of the NLRA, 29 USC 158(b)(1)(B), and therefore any action by the member challenging such discipline is always within the exclusive and preemptive jurisdiction of the NLRB."* [7].

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[6] The Union alleges that Finnie's claim for lost income due to diminished employment opportunities during the period he was wrongfully deprived of union membership is tantamount to a claim for "interference with existing or prospective employment relationships", and that it thus constitutes a claim of conduct prohibited by Section 8(b)(1)(B). Therefore, they argue, his action is a fortiori preempted by the NLRB. There is no merit to this contention.

First, it is obvious that *every* suspension or expulsion is going to entail lost employment opportunities wherever, as is often the case, the union in question has a lockhold on the available jobs in a given locale or industry. This Court has long held that an award for diminution of income due to such lost opportunities is proper in a case of discipline which is unlawful for lack of due process. See *Intl. Assn. of Machinists v. Gonzales*, 356 U.S. 617 (1958).

Moreover, the Union's contention misapprehends the focus of Section 8(b)(1)(B) prohibited activity. The "restraint", "coercion", or "interference" that 8(b)(1)(B) is concerned with involves restraint, coercion, or interference with the *employer's choice of its representatives*, not with the *union member's choice of employment*. See *NLRB v. Electrical Workers Local #340*, 481 U.S. 573 (1987), at 594. ("The statute itself reveals that it is the employer, not the supervisor-member, who is protected from coercion by the statutory scheme.")

[7] Section 8(b)(1)(B) of the NLRA defines prohibits union "restraint or coercion" of an employer "in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances." It is without dispute that Finnie was a "supervisor" in that he had

The trial court below adopted the Union's "bright line" interpretation, holding that determination of the preemption issue began and ended with the question, "Was he a supervisor who had grievance adjustment duties?" The trial court ruled that if the answer is "yes" (as admittedly is the case here), then there is no more to be decided and the matter is deemed preempted.[8]

However, Finnie contends that in fact this Court's decisions stand for no such rigid and mechanical rule. It is Finnie's contention that under the applicable decisions of this Court, especially as most recently explained in *NLRB v. Electrical Workers Local #340,* 481 U.S. 573 (1987), the true rule can be characterized as follows:

> " *Discipline of a supervisor-member who has grievance adjustment duties will constitute prohibited 'restraint' or 'coercion' of the employer within the meaning of Section 8(b)(1)(B) only upon two affirmative showings under the facts of the particular case:*
>
> " *(1) That the conduct for which the supervisor-member was disciplined involved the manner in which he performed his grievance adjustment duties, and not unrelated conduct; and*
>
> " *(2) That under all the facts of the case such discipline would cause actual coercion or restraint of the employer in his selection of supervisors, not merely remote, speculative, supposed, or potential restraint or coercion."*

It is Finnie's contention that under the particular facts of his case, neither of these two conditions was present, and

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grievance adjustment, albeit not collective bargaining, duties. However, on the voyage in question for this employer, he did not adjust grievances of any MEBA members, since there were no MEBA members aboard the ship other than Finnie.

[8] See trial court hearing transcript attached hereto as *Exhibit D.*

therefore his discipline could not even arguably constitute a Section 8(b)(1)(B) unfair labor practice notwithstanding that he was a supervisor with grievance adjusting duties.

The crucial facts which militate conclusively against Section 8(b)(1)(B) preemption are as follows:

(1) Finnie was not disciplined for any conduct involving the manner in which he performed his grievance adjustment duties; he was disciplined for refusing a superior officer's order to get off the ship, and for nothing else.

(2) The disciplinary proceedings were not even commenced until well after he had ceased working for this employer, for reasons wholly unrelated to either his discipline or the underlying labor dispute, and therefore there is no way his discipline could even arguably affect his future loyalty to this employer.

(3) There was no coercion or pressure, either direct or indirect, placed upon the employer to fire Finnie. The reason Finnie left the employ of this employer had nothing to do with his discipline or the threat of discipline; this voyage for this employer was always intended to be a temporary job only, and after completion of the voyage he left this employer to take a non-seagoing job with another company which had been arranged long prior to his ever undertaking this particular voyage for this employer. Moreover, he left this employer for the aforesaid personal reasons some three weeks before the union even commenced to institute disciplinary proceedings against Finnie, and many months before the union actually expelled Finnie. Accordingly, the discipline had no actual or even potential possible impact on this employer's selection or nonselection of Finnie as a supervisor.

Since the presence or absence of the above facts is crucial to the preemption question, we now set them forth in detail.

B. True facts concerning the nature and timing of Finnie's acceptance of employment aboard the "Valerie F."

All of the facts described below are supported in the record, as contained either in Finnie's state court petition (the relevant portions of which petition are attached hereto as *Exhibit A*) or in his declaration relating thereto (a copy of which declaration is attached hereto as *Exhibit B*): [9]

Finnie has always been a resident of the San Francisco area. In 1978 Finnie undertook employment as a chief engineer on an oceangoing ship owned by Exxon Company. The Exxon employment was not related to his subsequent discipline.

The Exxon job involved long voyages where Finnie was away from his wife and home for long periods of time. By February 1979 Finnie had decided to seek shore-based employment so that he could spend more time at home. That month he learned that a new company was forming to be known as Ampac. They needed someone to supervise ship refitting in the San Francisco port. Finnie spoke with them and on February 15, 1979 they promised him employment. His Ampac job was to commence on March 25, 1979. Accordingly, Finnie tendered his resignation to Exxon on February 15, 1979. The Ampac job was not related to his subsequent discipline.

When Finnie reported to work at Ampac on March 15, 1979, he learned that there had been a delay in the startup of this new company due to difficulties with

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[9] As is admitted by the Union, since the preemption ruling in the trial court below was an adjudication of law and not of fact, and was based entirely on Finnie's petition and declarations, the factual allegations of Finnie's petition and declaration must be taken as true for purposes of this petition for writ of certiorari.

financing. He was advised by Ampac that operations would not commence for two to three more months. Accordingly, Finnie began looking for temporary work for two to three months until the Ampac position became available.

That weekend Finnie was contacted in San Francisco by one Captain Orion Larson with a short-term job offer to sail a ship known as the "Valerie F" from Jacksonville, Florida to Stockton, California. The ship was owned by a company named "Calrice" (the "employer" in this action).

Captain Larson was the head of the San Francisco Branch of the Master, Mates and Pilots Union. Finnie was not aware of any conflict between MEBA and MMP at the time he was offered this job by Captain Larson.

Captain Larson told Finnie that the MMP had just signed a top-to-bottom contract with a newly-formed company known as Calrice, who were the owners of the Valerie F. Under this contract MMP would represent marine engineers as well as all the other positions aboard the ship. Larson told Finnie that the ship was now in Jacksonville undergoing repairs, and they were trying to outfit a crew to sail it on its initial voyage from Jacksonville to Stockton. Larson offered Finnie the job as chief engineer for that initial voyage.

Since this voyage from Jacksonville to Stockton met Finnie's need for short term employment until the Ampac job materialized, Finnie accepted this job offer with Calrice. Although Finnie later learned that the Valerie F was a "hot ship" which was the subject of a jurisdictional dispute between MEBA and MMP, at the time he accepted this employment on March 18, 1979 he had no knowledge of this whatsoever.

Finnie arrived in Jacksonville on March 19, 1989 and commenced supervising repairs on the ship in preparation for its voyage to Stockton. On March 23, 1979 Finnie was

approached by a MEBA official, one Mr. Sasso. Mr. Sasso was the head of the Union's New Orleans branch. Finnie knew that Mr. Sasso was a MEBA union official, but he did not know Mr. Sasso personally and had never met him before.

Mr. Sasso told Finnie that he should get off the ship because MEBA was going to try to get the contract away from MMP. Sasso stated "we have no contract with Calrice, and we do not intend to let it sail until we do have one." Sasso threatened reprisals against Finnie if he did not get off the ship.

Sasso did not give Finnie any reason for the order to get off the ship other than that "We don't have a contract with the ship and we are instructing you not to sail the ship until such time as we do." [10]

Finnie told Sasso he would not get off the ship for two reasons: First, since MEBA had no contract to provide engineers he believed that MEBA's action was unlawful, and second, he felt he had both a legal and moral commitment to honor his agreement with Captain Larson to at least get the ship from Jacksonville to Stockton.

Shortly thereafter, Finnie accepted a membership book in MMP, and on April 7, 1979 the Valerie F sailed from Jacksonville to Stockton with an all MMP crew.

During the course of this voyage, Finnie held the position of Chief Engineer. The position of Chief Engineer is a supervisory one and as such it is within the definition of "supervisor" as defined in Section 2(11) of the NLRA at 29 USC 152(11). In his capacity as Chief Engineer Finnie did have authority to adjust grievances of engineer crew members under him. However, on this voyage he adjusted only grievances of MMP members;

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[10] Indeed, this much is admitted by Mr. Sasso himself in the written disciplinary charges filed by him. See *Exhibit E*.

there were no MEBA members on this voyage other than Finnie.

The ship arrived in Stockton on May 2, 1979. On May 12, 1979, the ship proceeded to San Francisco, where Finnie along with the rest of the crew formally "signed off articles" and left the ship. Finnie's employment with the ship's owner Calrice thus terminated on May 12, 1979.

Finnie never again worked on the Valerie F nor did he ever again work for Calrice after May 12, 1979. Rather, Finnie immediately went to work for Ampac on May 15, 1979 as a shore-based engineer, as had been arranged prior to his undertaking the short-term Calrice job aboard the "Valerie F".

As we will now show, Finnie was never *"compelled"* to leave employment with Calrice either by reason of his discipline or by reason of the subsequent NLRB action which Union filed against Calrice, nor did the Union ever "pressure" Calrice to terminate Finnie.

C. True facts concerning the nature and timing of the Union's discipline of Finnie.

The following facts are contained in Finnie's state petition (*Exhibit A*) and in his declaration (*Exhibit B*), and are also supported by the additional documentary exhibits specifically identified below:

On June 2, 1979 approximately three weeks after Finnie had ceased working for Calrice and had begun working for Ampac, Mr. Sasso filed disciplinary charges against Finnie for his refusal to get off the Valerie F. (See disciplinary charges, *Exhibit E*, and letter to Finnie, *Exhibit F*.)

On their very face, the written trial charges demonstrate that the conduct for which discipline was being instituted had nothing whatsoever to do with his perfor-

mance of Section 8(b)(1)(B) grievance-adjustment duties. (See disciplinary charges, *Exhibit E.*) [11]

On June 8, 1979, Mr. Sasso sent Finnie a letter notifying him of the charges and stating that a trial would be held in New Orleans on July 9, 1979. (See letter to Finnie, *Exhibit F.*)

On June 28, 1979, Finnie sent Mr. Sasso a letter enclosing his written objections to the charges, among which objections were the vagueness of the charges and the choice of New Orleans as the venue of the trial. (See letter to Mr. Sasso and attached objections to charges, *Exhibit G.*)

Finnie was tried in absentia in New Orleans on July 9, 1979. The trial committee found him guilty and recommended expulsion. (See trial transcript, *Exhibit H*; report of trial committee, *Exhibit I*; and summary of trial record, *Exhibit J.*)

This finding and recommendation were ratified by vote of the memberships of the various ports during their regular meetings held the week of September 3, 1979.

Finnie filed an intermediate administrative appeal with the union's National Executive Committee on September 5, 1979.

On April 1, 1980, the National Executive Committee notified Finnie that it had denied his intermediate appeal. He was advised that he could not file his final appeal until

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[11] Union states in its brief at pages 2-3 that "MEBA had expelled Finnie for disobeying the Unions' order *to stop working as a supervisory grievance-adjuster* for an employer with which MEBA had a labor dispute." This artful phraseology is designed to imply that it was the performance of grievance adjustment duties by Finnie which the Union objected to. That is simply untrue: the Union just wanted him off the ship, period, grievance adjustment or no grievance adjustment. Finnie was expelled for general insubordination, not for performing grievance adjustment. See the written disciplinary charges, *Exhibit E*; the reporter's transcript of the union trial proceedings, *Exhibit H*; the report of the union trial committee, *Exhibit I*; and the union's "Summary of Trial Record," *Exhibit J.*

the next meeting of the union's National Convention in March 1982.

On May 28, 1981 Finnie filed his petition for writ of mandate in the state court. Although his expulsion was not yet final he pled the well-recognized "futility exception" to the general rule requiring exhaustion of administrative remedies. (See Finnie petition, *Exhibit A,* Paragraph 9, at pages 10a through 12a of the Appendix hereto.) [12]

In March 1982 the union's National Convention denied his appeal, at which time his expulsion became final.

As can be seen from the above, it is clear that Finnie was *not* disciplined for conduct involving his performance of Section 8(b)(1)(B) grievance adjustment duties; his departure from the employ of Calrice was for reasons wholly unrelated to his discipline or to the underlying labor dispute; and there is nothing even suggesting that his discipline was designed to or did restrain or coerce Calrice in its selection of Finnie as a supervisory representative.

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[12] Union states in its brief (at p. 11, fn. 8), that "The timing of Finnie's suit is but one example of the threat his action poses to the uniformity of the federal labor law as regulated by the NLRB. Finnie (for reasons known only to him) chose to wait for over a year after his expulsion became final before filing his lawsuit. Thus, although his action was timely under the applicable four-year California statute of limitations, a Section 8(b)(1)(B) unfair labor practice charge was by then barred by the six-month limitations period of Section 10(b) of the Act." The Union is guilty of an extremely material misrepresentation of fact when it states that Finnie "chose to wait for over a year after his expulsion became final before filing his lawsuit." In fact, he filed his action *before* his expulsion had become final, pleading the "futility" exception to the usual rule requiring finality of administrative determinations. Thus, Finnie's action would have been timely even under the six-month statute of limitations applicable to NLRB proceedings.

Moreover, there is no basis in general principles of law for claiming that one forum is to be preferred over another because the forums have differing statutes of limitations. Each forum is free to establish its own statute of limitation.

Finally, we will address one very misleading fact matter raised by the Union its brief, namely the NLRB proceedings between MEBA, MMP and Calrice which *followed* Finnie's departure from Calrice. As will be shown, those proceedings had *nothing whatever* to do with Finnie, or with his discipline, or with his departure from Calrice.

D. True facts concerning the nature and timing of the NLRB proceedings between MEBA, MMP, and Calrice.

Although Finnie was ignorant of the true facts giving rise to this labor dispute at the time he accepted this employment, Finnie learned the true facts long after his expulsion (mainly through discovery in the instant action).

In reality, MEBA was quite right in seeking to prevent the ship from sailing. It was rightly protesting an attempted illegal raid by MMP in collusion with Calrice. The true facts were that Calrice was merely a dummy corporation and alter ego of the prior owners, and it was set up solely for the purpose of unlawfully terminating the previous contract with MEBA and its sister unions. Unknown to Finnie at the time, the shipowners and MMP had entered into a collusive scheme whereby the dummy corporation Calrice was created, the ship was sold by the prior owners to the dummy corporation (who in reality were the same individuals), and the dummy corporation then entered into a new and cheaper contract with MMP to man the entire ship.

MEBA and its sister unions subsequently filed unfair labor practice charges in the NLRB against Calrice (and a member of one sister union filed charges against the MMP). However, those subsequent NLRB proceedings had nothing whatever to do with Finnie, his employment, or his discipline.

On May 11, 1979, MEBA and its sister unions filed unfair labor practice charges before the NLRB against Calrice (Case No. 20-CA-14589, "Charge Against Employer"). The gravamen of the charges against Calrice was breach of an existing valid collective bargaining agreement and unlawful recognition of the MMP, and the NLRA sections claimed to be violated were 8(a)(3), 8(a)(4), and 8(a)(5). Those charges did not name Finnie, did not involve Finnie, and did *not* involve any claimed 8(b)(1)(B) violations on the part of anyone. To enable the Court to verify this for itself, we have attached as *Exhibit K* the full text of the NLRB complaint based on those charges which was filed by NLRB general counsel on June 25, 1989. [13]

As can be seen from the face of the complaint, nowhere does it mention Finnie nor his performance of Section 8(b)(1)(B) duties, nor does it mention Finnie at all in any context. Neither Finnie nor his discipline were the subject matter of this NLRB action in any way. (Indeed, it was not filed until June 25, 1979, 44 days *after* Finnie had already left the employ of Calrice to go to work for Ampac. He left Calrice on May 12, 1979 and commenced working for Ampac on May 15, 1979.)

Almost immediately, on June 28, 1979, Calrice settled the complaint with MEBA and its sister unions

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[13] The NLRB "Consolidated Complaint" attached hereto as *Exhibit K* also makes reference to an additional set of charges denominated Case No. 20-CB-4873, which was consolidated with the MEBA charges against Calrice denominated Case No. 20-CA-14589. Case No. 20-CB-4873 ("Charge Against Labor Organization") relates to unfair labor practice charges filed on May 25, 1979 by Pete Pokrajac, a member of one of MEBA's sister unions, against the MMP. The gravamen of his charges was against the MMP was the MMP had attempted an illegal jurisdictional raid and wrongfully caused the discharge of the previous crew, in violation of Sections 7 and 8(b)(2). Pokrajac's charges against MMP were consolidated with MEBA's charges against Calrice. As can be seen from *Exhibit K*, Pokrajac's charges—just MEBA's charges— did not involve any claimed 8(b)(1)(B) violations by anyone.

pursuant to a written "Settlement Agreement" between them. The NLRB subsequently approved the settlement on July 18, 1979 and the NLRB general counsel dismissed the complaint Calrice on August 2, 1979.

We have attached a complete copy of the June 28, 1979 Settlement Agreement as *Exhibit L* for this Court's examination, because it is the subject of a very critical misrepresentation made by the Union in its certiorari brief. In its brief at page 4 the Union states: *"A settlement was reached shortly thereafter, under which Calrice agreed to honor the MEBA contract, and to replace the MMP crew (including Finnie) with an MEBA crew. Finnie's employment was terminated and he was replaced as Chief Engineer."* The Union's wording is artfully phrased, minus any dates, to implicitly suggest that Finnie was terminated by Calrice as a result of the MEBA charges filed against Calrice, the subsequent NLRB complaint, and the subsequent settlement agreement. Nothing could be further from the truth.

As is clear from the face of the Settlement Agreement (*Exhibit L*), nowhere in it is there any mention whatsoever of Finnie, let alone any agreement that Finnie would be terminated from the employ of Calrice or replaced by any other particular individual.

The reason why Finnie is not mentioned in the Settlement Agreement is simple and obvious: *Finnie, for reasons of his own having nothing to do with this labor dispute, had already terminated his employment with Calrice some six weeks previously on May 12, 1979.*

The plain fact is that this June 28, 1979 Settlement Agreement had no effect whatsoever (nor could it) on Finnie's already-completed employment Calrice, nor did the filing of the NLRB charges by MEBA or the subsequent Settlement Agreement have any effect of (nor could

it) of coercing or restraining Calrice in its selection of Finnie as a Section 8(b)(1)(B) representative.[14]

Therefore, the subsequent NLRB proceedings are a "red herring" insofar as this petition for certiorari is concerned: the NLRB proceedings post-dated Finnie's employment with Calrice, had nothing whatever to do with either his discipline or with his employment with Calrice, and did not and could not have exerted any *ex post facto* coercive effect upon Calrice in its selection of Finnie.

We will now show why, in light of the foregoing facts, the result reached below is wholly consistent with the recent pronouncements of this Court.

ARGUMENT

In *San Diego Trade Unions Council v. Garmon*, 359 U.S. 236 (1959), this Court established a guideline which we acknowledge is applicable to this case:

> "When it is *clear or may fairly be assumed* that the activities which a State purports to regulate are protected by Section 7 of the

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[14] This brings us to the most egregiously fraudulent fact assertion contained in Union's brief. In its brief at page 12, footnote 9, the Union states: "...[T]he Unions threatened Finnie with discipline, and *successfully pressured Calrice to replace him, while he still worked for the company.*" This is a flat out lie and no more graceful way of putting it does justice to the outrageousness of this assertion. As the evidence cited above demonstrates, at no time did the Union ever pressure Calrice to fire Finnie, either directly or indirectly, whether by means of their internal discipline or by means of the NLRB action, both of which post-dated Finnie's employment with Calrice.

If in fact the Union had "successfully pressured Calrice to replace him", there is no question but that this would be a preempted Section 8(b)(1)(B) unfair labor practice. But saying it is so doesn't make it so. We challenge the Union to produce a single iota or shred of evidence to this Court that would support this assertion. In the 2,401 pages in the record on appeal in the state action, there is not one shred of evidence in that record to support this assertion.

> National Labor Relations Act, or constitute an unfair labor practice under Section 8, due regard for the federal enactment requires that state jurisdiction must yield." *Id* at 244. (Emphasis added.)
>
> "[W]hen an activity is *arguably subject to Sec. 7 or Sec. 8 of the Act*, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." *Id* at 245. (Emphasis added.)

Thus, under *Garmon*, if the union's discipline of Finnie was "arguably" an unfair labor practice under Section 8(b)(1)(B) (in that it constituted an attempt by the union to coerce or restrain the shipowner in its selection of grievance adjusters), NLRB preemption would exist.

However, *Garmon* does not mean that everything and anything relating to labor relations is automatically preempted. For example, even *Garmon* itself noted that discipline of nonsupervisory rank-and-file members has long been held to be a nonpreempted activity which is of only peripheral concern to the federal scheme of labor regulation. See e.g. *Intl. Assn. of Machinists v. Gonzales*, 356 U.S. 617 (1958). Moreover, this Court in *NLRB v. Electrical Workers Local 340*, 481 U.S. 573 (1987), has now made it pretty clear that "arguably" means something approaching "probably," and not merely "maybe" or "possibly" or "potentially".

As we will now show, under this Court's teachings subsequent to *Garmon*, even the discipline of supervisory members is not automatically a prohibited 8(b)(1)(B) unfair labor practice merely because of the member's status as a "supervisor"; and in the factual context of Finnie's case his discipline could not "arguably" nor even by the remotest stretch of the imagination possibly con-

stitute prohibited (and therefore preempted) employer coercion or restraint under Section 8(b)(1)(B).

I. THE HISTORICAL TREND OF THIS COURT'S DECISIONS HAS BEEN TO RESTRICT THE ATTEMPTS OF THE NLRB TO UNDULY EXPAND ITS JURISDICTION OVER THE DISCIPLINE OF SUPERVISOR-MEMBERS.

Prior to 1968, the NLRB had not attempted to assert 8(b)(1)(B) jurisdiction over the discipline of supervisors absent some showing a tangible act of coercion or restraint by the union in the employer's selection of supervisors.[15] However, the NLRB soon began expanding its jurisdiction to include all manner of supervisor discipline cases on the theory that such discipline could create "potential" coercion on the employer.

The first major NLRB expansion was in 1968 in *San Francisco-Oakland Mailers' Union No. 18* (1968), 172 NLRB 2173.[16] A second major NLRB expansion was in

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[15] For purposes of this petition, we use the term "supervisors" to mean only supervisors whose regular job duties include either grievance adjustment or collective bargaining responsibilities, i.e. Section 8(b)(1)(B) duties.

[16] In *Oakland Mailers*, three union-member foremen were expelled for assigning work in violation of the collective bargaining agreement. Despite the absence of union pressure or coercion aimed at securing the replacement of the foremen, the Board held that the union had violated Section 8(b)(1)(B) by seeking to influence the manner in which the foremen interpreted the contract, i.e. to make work assignments more favorable to the union. The NLRB held that the union's coercion consisted of seeking "the substitution of attitudes rather than persons." The NLRB reasoned that the natural and foreseeable effect of such discipline was that in interpreting the agreement in the future, the supervisor would be reluctant to take a position adverse to that of the union. It held that this potential for depriving the employer of the undivided loyalty of his supervisor in the future constituted potential, if

1969 in *New Mexico District Council of Carpenters (Horner)*, 176 NLRB 797 and 177 NLRB 500.[17]

A third major NLRB expansion occurred in 1971 in a trio of companion cases: *IBEW Local 2150 (Wisconsin Electric)*, 192 NLRB 77; *Electrical Workers Local 134 (Illinois Bell)*, 192 NLRB 85; and *Electrical Workers Council U-4 (Florida Power)*, 193 NLRB 30. In all three of those cases, the union disciplined supervisors who crossed picket lines to perform struck work, even though they only performed rank-and-file work and did not perform any supervisory duties. Even though it is clearly not an unfair labor practice to discipline rank-and-file workers for crossing picket lines to perform rank-and-file work, the NLRB held that in the cases of the supervisors it was an unfair labor practice within 8(b)(1)(B). The NLRB again relied on its theory of potential future coercion, reasoning that at some point in the future when these supervisors did perform supervisory duties, they would be likely to favor the union over the employer to ingratiate themselves with their union and avoid future discipline. It was at this point that the NLRB announced that 8(b)(1)(B) had become in its eyes "a general prohibition of a union's disciplining supervisor-members for their conduct." It was also at this point that this Court stepped in, and, in the

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not present, coercion within 8(b)(1)(B).

[17] In *Horner*, a road crew foreman was fined for working for a nonunion employer whom the union wanted to force into a contract. Even though the union made no attempt to get him fired, the NLRB held this to constitute indirect 8(b)(1)(B) coercion. It reasoned that the real reason for the fine was not to punish the foreman, but to make it hard for the employer to find foremen willing to work for him. It held that the union used its internal disciplinary rules to effectively boycott an employer who did not have a contract by making it a violation to work for such employer; ergo, the underlying dispute was between the union and an employer and not between the union and its member.

words of Justice Brennan in the 1987 case of *Electrical Workers Local #340*, 481 U.S. at 581, "this expansion came to an abrupt halt; indeed a retreat was called."

In the 1974 case of *Florida Power & Light vs. Electrical Workers*, 417 U.S. 798 (1974), this Court reversed all three NLRB rulings in *Wisconsin Electric, Illinois Bell*, and *Florida Power* and held that the union discipline did not constitute an unfair labor practice under 8(b)(1)(B). The Court held that 8(b)(1)(B) cannot be read to prohibit discipline of supervisors for performance of rank-and-file work during a strike. The Court created a restrictive "adverse effect" test to determine when 8(b)(1)(B) is violated. The Court held as follows: First, Congress did not intend to protect employers from union restraint or coercion in any activity other than the *selection* of its supervisors. *Florida Power*, 617 U.S. at 804-805. Second, discipline of a supervisor-member can constitute an 8(b)(1)(B) violation only when the discipline may adversely affect the supervisor's conduct in performing his duties of grievance adjusting or collective bargaining. *Id* at 805. Third, the only time that any adverse effect can occur on future grievance adjusting or collective bargaining activities is if the supervisor is disciplined for behavior that occurs *during* the performance of such duties. *Id* at 805. The Court held that the "general impact" of discipline on a supervisor's future loyalty to the employer is insufficient to create an 8(b)(1)(B) violation. *Id* at 807. The Court acknowledged that any discipline of a supervisor for performing tasks other than grievance adjustment or collective bargaining "might make the supervisor subservient to the union's wishes when he performs those duties in the future"; nevertheless the legislative history indicates that Congress refused to consider the problem of conflicting loyalties in enacting the NLRA and did not design 8(b)(1)(B) to guarantee the undivided loyalty of supervisors. *Id* at 812-813. The Court held that the NLRB had

exceeded its limits in holding that the discipline of supervisors was always an 8(b)(1)(B) violation even though grievance adjustment or collective bargaining activities were not involved. *Id* at 801-802.

As can be seen from the record in Finnie's case, there is nothing whatever indicating that he was disciplined for conduct relating to his performance of his grievance adjusting duties.

II. EVEN IF ABC v. WRITERS GUILD WEST WERE THE LAST WORD OF THIS COURT ON THE MATTER, UNDER ITS OWN TERMS THERE IS NOT EVEN AN ARGUABLE BASIS FOR FINDING SECTION 8(b)(1)(B) PREEMPTION IN FINNIE'S CASE.

In *ABC v. Writers Guild West*, 437 U.S. 411 (1978), this Court applied the adverse-effect test enunciated in *Florida Power* and held that union discipline of supervisors who performed 8(b)(1)(B) activities (specifically grievance adjustment) during a strike violated the employer's rights under 8(b)(1)(B).[18] Because *ABC* is one of the cases primarily relied upon by the Union, certain factual distinctions Finnie's case should be noted:

(1) The Court particularly noted that a coercive effect deprived from the fact that ABC did not have the

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[18] In *ABC*, supervisory members of the Writers Guild crossed picket lines during a strike, and during the strike they did perform 8(b)(1)(B) duties including the adjustment of grievances. The strike was a long one, and the discipline was imposed both during the strike and afterwards. The disciplined members continued to work for ABC. ABC brought unfair labor practice charges. Applying the "adverse effect test" of *Florida Power*, the Court held that because the discipline was for the performance of 8(b)(1)(B) activities (grievance adjustment) and not for some other activity, there was a clear adverse effect on the supervisors' future loyalty to ABC in the performance of such activities in the future.

option of requesting that the supervisors resign from membership and thereby avoid discipline, since the collective bargaining agreement prohibited members from resigning during or within six months after a strike. That was not the case with Finnie; if Calrice felt coerced it could have requested Finnie to resign, but it did not.

(2) Even though some of the discipline occurred after the strike was over, the disciplined members continued to work for ABC. In Finnie's case, the discipline was not even commenced until after he had already resigned from Calrice for unrelated reasons. Therefore the potential for future divided loyalty, i.e. coercion in the employer's ability to freely select loyal supervisors, was not present in Finnie's case as it was in ABC.[19]

(3) In ABC, the conduct for which the supervisors were disciplined was their performance of supervisory grievance adjustment duties during the strike. In Finnie's case, the conduct for which he was disciplined had nothing to do with his performance of Section 8(b)(1)(B) grievance adjustment during the voyage; he was disciplined solely for his insubordination in disobeying a superior's order to get off the ship. This is clear from the union's own records relating to the discipline (*Exhibits E, F, G, H, I and J*).

(4) In Finnie's case, the trial court failed to make the finding required by both *Florida Power* and *ABC* that

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[19] Even if arguendo it were deemed that Finnie's future willingness to work for Calrice as a supervisor, assuming he had any such desire, was arguably chilled by his discipline, this still would not be a basis for preemption. The *ABC* Court stated, in dictum not necessary to the result, that any discipline which affected a supervisor's future "willingness to serve" as supervisor would violate 8(b)(1)(B). However, as will be shown below, this Court subsequently disavowed that dictum in *NLRB v. Electrical Workers #340*, 481 U.S. 573 (1987), and expressly stated that a hypothetical adverse impact on "future willingness to serve" did not constitute restraint or coercion within the meaning of 8(b)(1)(B).

the union's discipline of Finnie had an *actual* and not merely supposed or hypothetical "adverse effect" on Calrice's selection of loyal supervisors. In *ABC*, to the contrary, the Court in upholding the NLRB's finding of jurisdiction noted with approval that the NLRB *did* make such a finding as required under *Florida Power*.[20]

We submit that even if *ABC* were the last word on the subject, under its own terms and those of *Florida Power* there is not even an arguable basis for asserting 8(b)(1)(B) preemption here, where the discipline was not for the performance of 8(b)(1)(B) duties and where not an iota of actual or even remotely possible coercion upon Calrice was or could be shown.

However, *ABC* is not the last word. In the 1987 case of *NLRB v. Electrical Workers #340*, (1987), 481 U.S. 573, this Court decisively rejected the NLRB's views about "possible" or "potential" future coercion, and came down squarely in favor of a requirement that actual, tangible coercion be shown.[21]

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[20] In *ABC* the Court reiterated the requirement of such a finding: "[W]e are of the view that the Board correctly understood *Florida Power & Light* to mean that in ruling upon a § 8(b)(1)(B) charge growing out of union discipline of a supervisory member who elects to work during a strike, it may—indeed it must—inquire whether the sanction may adversely affect the supervisor's performance of his collective bargaining or grievance adjustment tasks and thereby coerce or restrain the employer contrary to § 8(b)(1)(B)." *ABC*, 437 U.S. at 430. The trial court in Finnie's case felt such a finding was not necessary, and chose to adopt the Union's reading of *ABC* as standing for a "bright line" rule that discipline of supervisors is *always* a Section 8(b)(1)(B) prohibited activity. (See hearing transcript at *Exhibit D*.) We submit that neither the Union nor the trial court correctly read *ABC*.

[21] In fairness to the Finnie trial court, it should be noted that since it decided the matter in October 1986 it did not have the benefit of *NLRB v. Electrical Workers Local #340*, which was decided in 1987. However, both the California Court of Appeal and the California Supreme Court were apprised of *NLRB v. Electrical Workers Local #340*.

III. THIS COURT HAS NOW MADE IT CLEAR, IN NLRB v. ELECTRICAL WORKERS LOCAL #340, THAT "ARGUABLE COERCION OR RESTRAINT" JUSTIFYING PREEMPTION MEANS SOMETHING FAR MORE TANGIBLE THAN MERELY "POSSIBLE", "HYPOTHETICAL", OR "POTENTIAL" COERCION OR RESTRAINT.

In *NLRB v. Electrical Workers Local #340, 481 U.S. 573 (1987), this* Court held that union discipline of supervisors who crossed a picket line to work for a nonunion employer, but who were *not* disciplined for the manner in which they performed grievance adjustment duties, did not fall within 8(b)(1)(B). In that case the Court made its strongest condemnation to date of the NLRB's tendency to arrogate excessive jurisdictional authority to itself in the area of union discipline of supervisor-members.[22] The key holdings of significance to Finnie are as follows:

(1) The Court rejected wholesale the NLRB's "reservoir doctrine" and the NLRB decisions applying it.[23]

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[22] In this connection, we note that the Union asserts that the NLRB's assumption of jurisdiction in 1985 over the discipline of another MEBA Chief Engineer, Albert Willard, is conclusive proof that Finnie's expulsion at least "arguably violated" 8(b)(1)(B). The assertion is without merit. Willard's NLRB complaint is attached hereto as *Exhibit M*. As can be seen, it does not contain facts sufficient to advise this Court whether Willard's case was factually identical to Finnie's, nor does the Willard complaint describe the nature of the adverse impact upon the employer's freedom of selection which this Court has now held is required for NLRB jurisdiction. Moreover, even if arguendo Willard's case were factually identical to Finnie's, then we submit that the NLRB's assumption of jurisdiction was improper under *Florida Power, ABC, and especially Electrical Workers Local #340.*

[23] Under the NLRB's "reservoir doctrine", discipline of a supervisor for conduct other than his performance of section 8(b)(1)(B) duties during a strike (i.e. grievance adjustment or collective bargaining) was

(2) The Court rejected wholesale the NLRB's "future conflict of loyalties" rationale. It held that a vague supposition about possible future divided loyalties was insufficient to bring 8(b)(1)(B) coercion into play, and it emphasized in the strongest possible terms the necessity for a factual inquiry into whether the discipline actually had an adverse effect on the employer's selection of its supervisors.[24]

(3) The court disavowed dictum in ABC to the effect that 8(b)(1)(B) can bar discipline of a supervisor for acts other than those which occur while the member is engaged in grievance adjustment or collective bargaining.[25]

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still deemed to constitute "coercion or restraint" in the employer's selection of supervisors, on the following theory: the discipline might affect the supervisor's loyalty to the employer; the effect of such discipline might linger so that fewer members are willing to serve as supervisors; and therefore the "pool" or "reservoir" from which employers can choose supervisors is thereby smaller. This Court strongly criticized this chain of "mights", stating "The reservoir doctrine, and this chain of suppositions on which it rests, cannot be reconciled with...the Court's limited construction of §8(b)(1)(B) in *Florida Power* and *ABC*." *Electrical Workers Local #340*, 481 U.S. at 586.

[24] "[T]he crux of the Court's holding in *ABC* was that the Board must make a factual inquiry whether a union's sanction may adversely affect the employer-representative's performance of collective-bargaining or grievance adjusting duties before a §8(b)(1)(B) violation can be sustained. [Citation omitted.] One simply cannot discern whether discipline will have an adverse impact on a supervisor-member's future performance of §8(b)(1)(B) duties when their existence is purely hypothetical." *Electrical Workers Local #340*, 481 U.S. at 588.

[25] "Insofar as dictum in *ABC* suggests that a union may not discipline supervisor-members for acts or omissions that occur while the supervisor-member is engaged in supervisory activities *other than* §8(b)(1)(B) activities, the dictum is inconsistent with *Florida Power*, and we disavow it." *Electrical Workers Local #340*, 481 U.S. at 586. (Emphasis in original.)

(4) The court disavowed dictum in *ABC* to the effect that any discipline that affects the supervisor's future willingness to serve constitutes §8(b)(1)(B) coercion.[26]

In summary, it is clear under *Florida Power, ABC,* and *Electrical Workers Local #340* taken together, that there cannot even arguably be any §8(b)(1)(B) coercion over the employer's selection of his representatives where as here:

(1) The discipline was not imposed for the manner in which Finnie performed his 8(b)(1)(B) duties; and

(2) Since Finnie had already resigned from this employer, for reasons wholly unrelated to the discipline or the threat of discipline, there was no actual or even potential adverse impact on this employer's selection of him as a representative; and

(4) The record is bereft of any evidence that the Union utilized Finnie's loss of union status as a vehicle for getting him fired or otherwise pressured Calrice to fire him.[27]

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[26] "This statement was unnecessary to the disposition of *ABC*. There the Court held that the union fines had adversely affected the manner in which the employer-representatives *fulfilled §8(b)(1)(B) functions* and therefore interfered with the employer's control over its representatives." *Electrical Workers Local #340*, 481 U.S. at 592, fn. 15. (Emphasis in original.)

[27] Indeed, this is precisely why the Union's reliance on the cases of *Iron Workers v. Perko*, (1963), 373 U.S. 701, *Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971), and *Operating Engineers v. Jones*, 460 U.S. 669 (1983), is so misplaced. What crucially distinguishes those cases from Finnie's case is that, in each of them, following the discipline the union made direct demand on the employer that it fire the employee and did in fact procure the employee's firing. In *Perko* and *Lockridge*, following the discipline resulting in loss of membership, the union immediately made demand on the employer that the employee be fired upon threat of actual or implied work stoppage, and in both cases in order to avoid trouble the employer complied. In *Jones*, the union member had not even been disciplined at all; rather, he alleged that due to longstanding personal animosity a union official falsely claimed to the

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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employer that he was not a member in good standing, and thereby got him fired. In all three cases, the crux of the prohibited 8(b)(1)(B) conduct was not that the union had disciplined the member, but rather that the union thereafter used the fact of the member's loss of union status as a vehicle to directly coerce and restrain the employer in its selection of employees by forcing the employer to fire the person. By contrast, the facts of Finnie's case lack the direct interference in the employer-employee relationship which the unions were guilty of in *Perko, Lockridge,* and *Jones*. If it is to be held that the union discipline in the instant action "arguably" constituted prohibited restraint and coercion of Finnie's employer under 8(b)(1)(B), such a conclusion will have to find support in sources other than *Perko, Lockridge,* or *Jones*.

APPENDIX

INDEX TO EXHIBITS

(continued next page)

INDEX TO EXHIBITS (CONTINUED)

APPENDIX EXHIBIT A (PAGE 1 OF 14)

RELEVANT EXCERPTS FROM FINNIE'S PETITION FOR WRIT OF MANDATE (FILED MAY 28, 1981 IN CALIFORNIA SUPERIOR COURT)

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Filed May 18, 1981
/ss/ Carl W. Olsen, Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO

ROBERT N. FINNIE, Petitioner, vs. DISTRICT NO. 1 - PACIFIC COAST DISTRICT, MARINE ENGINEERS BENEFICIAL ASSOCIATION, et al., Respondents.	No. 780-847 Petition for Writ of Mandate and Award of Damages.

Petitioner alleges:

NATURE OF PETITION.

1. This is an action against two labor unions (a national parent union and its subsidiary district union) brought by a member of said unions arising out of his wrongful expulsion from said unions and their wrongful denial of his internal appeal therefrom. The acts and conduct of the unions in both the trial proceeding and the

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appellate proceeding violated numerous due process safeguards in the unions' own constitutions and bylaws governing the procedure to be followed, and also violated petitioner's due process rights under California common law. Petitioner accordingly seeks issuance of an alternative writ of mandate compelling the unions to reinstate him to membership or to show cause why they have not done so, followed by issuance of a peremptory writ of mandate compelling his reinstatement and a jury trial on the issue of damages incurred by petitioner as a proximate result of said wrongful expulsion. * * *

5(b) The subject expulsion trial was held in the New Orleans Branch Office of respondent union. Since 1952 the only hiring hall of respondent union through which petitioner has obtained employment has been the San Francisco Branch Office located at 340 Fremont Street, San Francisco, California. Never since 1953 has he ever obtained employment through any Branch Office other than the San Francisco Branch Office, and never in his life has he ever obtained employment through the New Orleans Branch Office. Since 1953 petition has been a resident of Marin County, California. Never in his life has petitioner ever been a resident of New Orleans.

5(c). In early 1979 petitioner entered into an employment agreement with a newly formed steamship company, American Pacific Container Line, to serve as chief engineer for them commencing March 15, 1979. He accordingly tendered his resignation to his previous employer on February 15, 1979. However, upon reporting to American Pacific Container Line on March 15, 1979, he

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factorily completed, operations would not commence for another two to three months. Consequently, it became necessary to obtain short-term employment in the interval since he had already resigned from his previous employer. At that point his initial intention was to go to the hiring hall of respondent union's San Francisco Branch Office located at 340 Fremont Street, San Francisco, and obtain a "relief trip" for one or two voyages. A relief trip is where a person substitutes for a regular engineer who is on vacation. However, shortly after learning of the delay in his new employment with American Pacific Container Line, and before he had the opportunity to go to the hiring hall of the respondent union, petitioner received a telephone call, on approximately March 17 or 18, 1979, from Captain Orion Larson, the local head of the Masters, Mates and Pilots Union in San Francisco (referred to hereinafter as the "MMP union"). He was told that the MMP UNION had recently contracted with a company known as Calrice Transport, Inc., of Sacramento to supply them with marine engineers and other ship personnel. Calrice Transport, Inc. operated a vessel known as the "VALERIE F", engaged in trade between Stockton, California and Puerto Rico. Said vessel carried rice from Stockton, California to Puerto Rico, returned empty to Florida where it was loaded with phosphate, and then returned with the cargo of phosphate to Stockton, California. The MMP union had recently signed a contract with Calrice Transport, Inc. to provide all crew members, including licensed engineers, for the "VALERIE F". Petitioner was offered the chief engineer's job aboard the "VALERIE F", and he accepted. The following day,

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approximately March 18 or 19, 1979, he flew to Jacksonville, Florida, to join the vessel, where it was undergoing repairs.

5(d) The vessel "VALERIE F" had formerly been owned by a company known as Bulk Food Carriers. Bulk Food Carriers had a contract with the Sacramento Rice Growers Association to transport rice to Puerto Rico. Bulk Food Carriers eventually went bankrupt. At the time Bulk Food Carriers owned the "VALERIE F", Bulk Food Carriers had contracts with various unions to provide personnel for various positions aboard the "VALERIE F"; the MMP union provided the master and deck officers (4 persons), the respondent MEBA union provided the marine engineers (3 persons), and various other maritime unions provided various other personnel in various categories. Following the bankruptcy of Bulk Food Carriers, the Sacramento Rice Growers Association (in order to insure that they would continue to have a means of transporting their rice to Puerto Rico) formed a new company which took over the ownership of the "VALERIE F". Said new company was known as Calrice Transport, Inc. After Calrice Transport, Inc. was formed, it negotiated a contract with the MMP union to provide all of the shipboard personnel, including marine engineers. It was pursuant to this new MMP union contract with the new owners of the vessel "VALERIE F" that petitioner was hired in San Francisco as chief engineer in mid-March, 1979.

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5(e). At the time petitioner accepted employment aboard the "VALERIE F", he was told by Captain Orion Larson of the MMP union that there would be no problem with the respondent MEBA union.

5(f). Shortly after petitioner arrived in Jacksonville, Florida, to join the "VALERIE F", he was approached aboard the "VALERIE F" on approximately March 23, 1979, by Mr. A. P. Sasso, the Branch Agent (chief executive) of the New Orleans Branch Office of MEBA. Petitioner had never seen or met Mr. Sasso before in his life. At that time in Jacksonville petitioner learned for the first time from Mr. Sasso that it was the intention of respondent MEBA union to prevent the "VALERIE F" from sailing, in retaliation against the new owners of the "VALERIE F" for having contracted with the MMP union to supply marine engineers for the vessel. Mr. Sasso told petitioner that he did not want petitioner to sail aboard the ship. Petitioner responded that he felt he had an ethical and contractual duty to at least get the ship from Jacksonville, Florida, to Stockton, California, as he had promised he would do, and he further told Mr. Sasso that since MEBA no longer had a contract with the owners of the "VALERIE F", it had no right to dictate who could sail on it. Petitioner "signed on articles" aboard the "VALERIE F" on March 23, 1979. Later that same day, Mr. Sasso, the Branch Agent of the New Orleans Branch Office of MEBA, again came aboard the "VALERIE F" and attempted to coerce petitioner to break his contract with the owners of the "VALERIE F", but petitioner declined to do so. At that time Mr. Sasso threatened

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petitioner with reprisals if he sailed, a threat which was ultimately carried out.

5(g). On April 7, 1979, the "VALERIE F" sailed, with petitioner aboard as chief engineer. * * * On May 12, 1979, petitioner "signed off articles" in San Francisco and left the "VALERIE F". Petitioner ceased employment with Calrice Transport, Inc. as of that date, and has never since that date had anything further to do with Calrice Transport, Inc. or the "VALERIE F".

5(h). By certified letter dated June 8, 1979, petitioner was served at his home in Marin County, California, with notice that written charges had been filed against him in New Orleans and that an expulsion trial would be held in New Orleans on July 9, 1979. Said letter was signed by Mr. A.P. Sasso, Vice President of the Gulf Coast Area of MEBA and also Branch Agent of the New Orleans Branch Office of MEBA. Said written charges had been filed against petitioner in New Orleans by Mr. Sasso and by a patrolman in the New Orleans Branch Office of MEBA, a Mr. J.L. Bonnot, whom petitioner has never met in his life. Petitioner has never had any employment contacts whatsoever with the New Orleans Branch Office of MEBA; the "VALERIE F" did not at any time ever stop in New Orleans; and petitioner has never worked out of the New Orleans Branch Office of MEBA nor ever had any contacts with any members of the New Orleans Branch Office of MEBA except for the time Mr. Sasso came aboard the "VALERIE F" in Jacksonville, Florida to threaten him. Notwithstanding the foregoing, the expulsion trial was subsequently held in New Orleans on July 9, 1979, and petitioner was thereat expelled. The trial

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proceeding was held ex parte without petitioner being present.

RESPONDENT UNION'S VIOLATIONS OF PETITIONER'S DUE PROCESS AT THE TRIAL LEVEL.

7. In all of the proceedings surrounding the trial, respondent union repeatedly, continuously and deliberately violated its own internal due process requirements as set forth in its national constitution, district constitution, and district bylaws. In doing so it also violated petitioner's fundamental rights of due process and fairness under California common law. Hereinbelow set forth are the specific procedures at the trial level mandated in the respondent union's governing documents which the respondent union violated, together with the manner in which said procedures were violated:

7(a). The respondent union violated the requirements of its own governing documents that the accused be provided with specific written charges and be given not less than 30 days to prepare his defense. * * *

7(b). Respondent unions violated their its own governing documents' requirement that petitioner's trial be held in San Francisco, and instead it deliberately held the trial in New Orleans knowing petitioner would be unable to afford the expense and inconvenience of attending and defending himself. * * *

7(c). Respondent union violated the requirements of its own governing documents that petitioner be given a full and fair hearing, be permitted the right to be represented by counsel, and be permitted to personally

appear and offer evidence as to his innocence and to cross-examine witnesses. * * *

7(d). Respondent union violated the requirements of its own governing documents that the trial be conducted by an impartial Trial Committee. * * *

7(e). Respondent union violated the requirements of its own bylaws that the "Report of the Trial Committee" must specifically state that the rights of the accused were safeguarded. * * *

7(f). The petitioner has never been provided with any evidence that the memberships of the ports comprising DISTRICT ONE MEBA voted on the charges separately, as is required by the union's own district constitution. * * *

7(g). Petitioner's fundamental rights of fairness and due process, as well as the guarantee of a full and fair trial afforded under the respondent union's governing documents, were violated in that the Trial Committee did not exercise any discretion in determining the degree of punishment to be levied against petitioner, but rather without explanation imposed the ultimate penalty of expulsion. * * *

RESPONDENT UNIONS' VIOLATIONS OF PETITIONER'S DUE PROCESS AT THE INTERMEDIATE APPEAL LEVEL.

8. The respondent union violated numerous provisions of its own constitution and bylaws in its handling of petitioner's intermediate appeal to the National Executive Committee. * * * [P]etitioner's rights of intermediate appeal were violated in the following respects:

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(1) Petitioner was not provided with a copy of the trial transcript until the time for appeal was within two days of expiring, and petitioner was forced to file his appeal without benefit of the trial transcript;

(2) The National Executive Committee did not hear the appeal expeditiously, but rather it waited some seven months before acting;

(3) Petitioner was never told where or when the National Executive Committee would meet and was thus denied the opportunity to appear in person as guaranteed to him under the union's governing documents;

(4) Petitioner was never advised, even after the National Executive Committee had met and rendered its decision, of the place and time of the meeting at which such decision had been made;

(5) The National Executive Committee made no written and signed findings and recommendations regarding its decision on the appeal, as it was required to do under the union's governing documents;

(6) No written and signed findings and recommendations of the National Executive Committee were ever submitted to petitioner as is required by the union's governing documents;

(7) No written and signed findings and recommendations of the National Executive Committee were ever submitted to the membership of the ports for ratification or rejection, as required by the union's governing documents;

(8) There is no evidence in the record that the National Executive Committee ever made the required findings as to whether the trial proceeding had been fair;

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(9) There is no evidence in the record that the National Executive Committee exercised any discretion with regard to the possible granting of a new trial, nor that it exercised any discretion with regard to possible lesser punishment.

The entire appeals procedure before the National Executive Committee was kept secret from petitioner, was summary in nature, and in every respect was in violation of petitioner's common law due process rights and in violation of petitioner's contractual rights under the union's governing documents. The respondent union's conduct in the appellate procedure was so blatantly in violation of any fundamental notions of fairness and its own rules that petitioner is excused from undertaking any further internal appeal within the union before requesting this court to reinstate him. Any further appeal would, in light of the record to date, be an exercise in futility and the result a foregone conclusion. The National Convention will be dominated by the same handful of high elected union officials who control the National Executive Committee, and petitioner has no reason to believe that a further appeal to the National Convention would be treated with any greater fairness or due process than was his intermediate appeal to the National Executive Committee. * * *

RESPONDENT UNIONS' VIOLATIONS OF PETITIONER'S DUE PROCESS AT THE FINAL APPEAL LEVEL.

9. Respondent union, in violation of its own rules and in violation of fundamental fairness and due process, has by deceit and trickery prevented petitioner from

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making a timely final appeal, and has by deceit and trickery taken actions that would force him to wait until March of 1982 before he can make a final appeal. For that reason petitioner is excused form having to exhaust such final appeal before obtaining judicial relief. * * * The National Convention meets every two years, on the third Monday of March in even numbered years. * * * Petitioner filed his intermediate appeal with the National Executive Committee on September 5, 1979. Petitioner was anxious for the National Executive Committee to act expeditiously on his appeal (as it was required to do under the union's own governing documents referred to hereinabove), so that in the event of an adverse decision by the National Executive committee he could make a timely final appeal to the next biannual meeting of the National Convention to be held during the third week of March, 1980. * * * The National Convention was eventually held in March of 1980, but petitioner was never advised of the location. * * * Notwithstanding that the National Executive Committee had to have met some time during that period, Petitioner was not advised of the National Executive Committee's rejection of his appeal until Mr. Calhoon's letter of April 1, 1980, i.e., he was not advised until *immediately after the 1980 National Convention had adjourned.* This conduct was done deliberately and in bad faith, with the intended effect of preventing petitioner from appealing to the 1980 National Convention and thereby forcing him to wait until the 1982 National Convention to seek relief. * * * Petitioner is therefore excused from being required to attempt further exhaustion of internal remedies, both by reason of the bad faith

conduct of respondent union in the appellate proceedings to date and by reason of the financial hardship and burdensome delay petitioner would suffer were he required to wait until the 1982 National Convention before obtaining judicial relief.

PETITIONER'S ENTITLEMENT TO WAGE LOSS DAMAGES.

10. The overwhelming majority of available marine engineer positions are with employers who are under contract to respondent union. By virtue of petitioner's wrongful expulsion from said union, petitioner is substantially impaired in his ability to obtain employment in his profession as a marine engineer. Said wrongful expulsion has rendered it extremely difficult for petitioner to obtain employment as a marine engineer, particularly as a chief engineer; and the employment he has been able to obtain, and will be able to obtain in the future, is at a substantially smaller salary than he could obtain as a MEBA chief engineer. As a proximate result of petitioner's wrongful expulsion, petitioner has incurred and is continuing to incur substantial diminution in wages in a sum in excess of $30,000 per year, and until such time as he is restored to membership in respondent unions petitioner will continue to incur such losses. * * *

PETITIONER'S ENTITLEMENT TO EMOTIONAL DISTRESS DAMAGES.

11. As a proximate result of respondent union's wrongful expulsion of petitioner, petitioner has been caused to endure substantial emotional distress, both by virtue of the severe impairment of his livelihood and by

virtue of being now shunned and avoided by former associates and acquaintances within respondent union.
* * *

PETITIONER'S ENTITLEMENT TO PUNITIVE DAMAGES.

12. All of the above conduct of the respondent union was fraudulent, malicious and oppressive. * * * By reason of the said fraudulent, malicious and oppressive conduct of respondent union, petitioner is entitled to punitive and exemplary damages, to punish respondent union and to make an example of it so as to discourage it from similarly wrongfully expelling other members in the future. * * *

PRAYER.

Wherefore, petitioner prays:

1. That the court issue an alternative writ of mandate commanding respondent unions to forthwith reinstate petitioner to membership in good standing or to show cause before this court why they have not done so;

2. That the court, after the show cause hearing on the alternative writ, issue a peremptory writ of mandate commanding respondent unions forthwith to reinstate petitioner to membership in good standing;

3. That petitioner be granted a trial by jury on the issue of the amount of damages suffered by him as a result of said wrongful expulsion;

4. That petitioner be awarded compensatory damages for diminution of earning capacity in an amount to be proved at trial;

APPENDIX EXHIBIT A (PAGE 14 OF 14)

5. That petitioner be awarded damages to compensate for emotional distress in an amount to be proved at trial;

6. That petitioner be awarded punitive and exemplary damages.

7. That petitioner be awarded his costs of suit herein incurred, including attorneys' fees;

8. That petitioner be granted such other and further relief as the court may deem proper.

Dated: May 13, 1981.

/ss/
Robert E. Cartwright
Cartwright, Sucherman, Slobodin & Fowler

Attorneys for Petitioner,
Robert N. Finnie

APPENDIX EXHIBIT B (PAGE 1 OF 5)

FINNIE'S DECLARATION CONTROVERTING RESPONDENT'S STATEMENT OF UNDISPUTED FACTS (FILED OCTOBER 8, 1986 IN CALIFORNIA SUPERIOR COURT IN OPPOSITION TO UNION'S MOTION TO DISMISS)

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Filed October 8, 1986
/ss/ Donald W. Dickinson,
Clerk

SUPERIOR COURT OF THE STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO

ROBERT N. FINNIE,

Petitioner,

vs.

DISTRICT NO. 1 - PACIFIC COAST DISTRICT, MARINE ENGINEERS BENEFICIAL ASSOCIATION, et al.,

Respondents.

No. 780-847

Declaration of Robert N. Finnie Controverting Respondent's Statement of Undisputed Facts

DECLARATION OF ROBERT FINNIE

I, Robert Finnie, declare:

1. I, Robert N. Finnie, was a member in good standing of MEBA from 1968 until his [sic: my] expulsion in September 1979.

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2. Prior to February 15, 1979 I had been working for many years as chief engineer aboard various inland and oceangoing vessels for various employers, the last of them being Exxon Corporation. (my Exxon employment was not an issue in the disciplinary proceedings giving rise to this action.)

3. In February, 1979, I determined that I wanted to cease seagoing employment and obtain shore employment, as I wanted to be able to spend more time with my wife. Accordingly I resigned from Exxon on February 15, 1979 and commenced seeking non-seagoing shore employment.

4. In February, 1979 I learned of a new shipping company that was to be formed called American Pacific Container Lines (AMPAC), and I entered into an agreement with them that I would commence working for them as an engineering consultant in their San Francisco office effective March 15, 1979. (My AMPAC employment was not an issue in the disciplinary proceedings giving rise to this action.)

5. When I appeared at AMPAC's offices to commence working for AMPAC on March 15, 1979, I learned that their had been a delay in the commencement of the company's operations and my consultancy job with AMPAC they would not be available for two to three more months. Accordingly, I needed some sort of short-term employment until the AMPAC job became available.

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6. I had planned to register at the MEBA hiring hall to get dispatched on a short-term interim seagoing job. However, on March 17 or March 18, 1979, I received a telephone call from Captain Orion Larson, an acquaintance of mine who was also vice president of the Masters, Mates & Pilots Union (MMP), who advised me of an available chief engineer's position aboard a ship called the "Valerie F" owned by a newly-formed company called CALRICE. Larson told me the ship was in Jacksonville, Florida being refitted and that CALRICE was hiring a crew to sail it from Jacksonville to San Francisco, approximately a 2-month voyage. Larson told me that CALRICE was a new company which had an agreement with MMP whereby MMP was to supply the entire crew including marine engineers. I accepted the job for this Jacksonville-to-San Francisco voyage as it met my needs for short-term income until my AMPAC shore job became available. At the time I accepted the job, I was unaware of any dispute between MEBA and CALRICE or MEBA and MMP concerning the ship.

7. I flew to Jacksonville and commenced employment with CALRICE as chief engineer aboard the "Valerie F" on March 21, 1986, at which time I was also given a membership in the MMP. Soon thereafter I learned for the first time that MEBA was in fact having a jurisdictional dispute with MMP and CALRICE concerning the ship. On March 23, 1986 a MEBA vice president, A.P. Sasso, ordered me to get off the ship, and told me "We do not have the contract and we are instructing you not to sail the ship until such time as we do." I refused to get off the ship. I told Sasso that I had doubts about the legality

APPENDIX EXHIBIT B (PAGE 4 OF 5)

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of MEBA's effort to prevent the ship from sailing and that I did not want to be a party of any illegality, and in any event I had made a promise to sail it to San Francisco and felt honor bound to keep that promise. I also told Sasso I did not like the ship and in any event I would be getting off as soon as I got it to San Francisco. I had a similar conversation with another MEBA official, Henry Borello, on March 26, 1979.

8. The ship sailed from Jacksonville with a non-MEBA crew on April 7, 1986 and arrived in San Francisco on May 12, 1979. I resigned from CALRICE's employment on May 12, 1979. On May 15, 1979 I commenced my long-planned consultancy shore job with AMPAC, and I continued to work for them until March 1980.

9. On or about June 4, 1979, after I had already resigned from CALRICE and commenced my shore employment with AMPAC, Sasso filed internal union disciplinary charges against me arising out of my refusal to get off the "Valerie F", and during the week of June 4-8, 1979 the memberships of the various MEBA port branches voted to try me on the charges.

10. On July 9, 1979 the union tried me in absentia in New Orleans and the trial committee recommended expulsion, subject to subsequent approval by the memberships of the various MEBA port branches.

11. During the week of September 3-7, 1979 the memberships of the various MEBA port branches voted

APPENDIX EXHIBIT B (PAGE 5 OF 5)

to accept the trial committee's recommendation of expulsion. The effective date of my expulsion was September 7, 1979.

12. I thereafter appealed my expulsion to MEBA's National Executive Committee by written letter dated September 5, 1979. The National Executive Committee, without ever notifying me of the time or place when such appeal would be heard and without giving me any opportunity to present my case, denied my appeal on March 17, 1980, and notified me of this fact by letter dated April 1, 1980. I thereafter appealed to MEBA's National Convention in March 1982, which also denied my appeal.

I declare under penalty of perjury that the foregoing is true and correct, that if called as a witness I could testify competently thereto, and that this declaration was executed at San Francisco, California on October 7, 1986.

/ss/
ROBERT N. FINNIE

APPENDIX EXHIBIT C (PAGE 1 OF 3)

FINNIE'S STATEMENT OF AGREEMENT OR DISAGREEMENT WITH RESPONDENT'S STATEMENT OF UNDISPUTED FACTS (FILED OCTOBER 8, 1986 IN CALIFORNIA SUPERIOR COURT IN OPPOSITION TO UNION'S MOTION TO DISMISS)

Dennis Kruszynski, Esq.
Cartwright, Sucherman & Slobodin
101 California Street, 26th Floor
San Francisco, CA 94111
Telephone: (415) 433-0440

Filed October 8, 1986
/ss/ Donald W. Dickinson,
Clerk

Attorneys for Petitioner,
Robert N. Finnie

SUPERIOR COURT OF THE STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO

ROBERT N. FINNIE,

Petitioner,

vs.

DISTRICT NO. 1 - PACIFIC COAST DISTRICT, MARINE ENGINEERS BENEFICIAL ASSOCIATION, et al.,

Respondents.

No. 780-847

Finnie's Statement of Agreement or Disagreement with Respondent's Statement of Undisputed Facts.

Respondents' moving papers contain a 13-page "Statement of Undisputed Facts", marked *Exhibit B* to their moving papers.

We agree that the facts stated therein are without dispute *except* for the alleged facts stated at the following locations in said *Exhibit B*, with which Finnie disagrees for the reasons stated in his declaration filed herewith:

APPENDIX EXHIBIT C (PAGE 2 OF 3)

Pg. 3, lines 4-9: Finnie has no knowledge whether or not MMP had ever previously been involved in any jurisdictional disputes with MEBA.

Pg. 3, lines 10-20: Finnie had no knowledge of the prior lockout at the time he accepted employment aboard the ship on March 21, 1979.

Pg. 4, lines 10-12: It is true that Finnie knew that the Valerie F had once been covered by a MEBA contract, but at the time he accepted employment aboard the ship on March 21, 1979, his understanding was that the previous owner who had the MEBA contract had gone bankrupt, and that the ship now had a totally new owner, a newly formed company known as CALRICE, who had legally and properly executed a new contract with the MMP. It was not until long *after* his expulsion that Finnie learned that the bankruptcy was in fact a sham, and that the new owner was actually the alter ego of the previous owner, and that the bankruptcy and ownership change was merely a ploy to get out of the MEBA contract.

Pg. 4, lines 21 to pg. 5, line 2: Finnie has and had no knowledge of whether or not the ship could sail without him.

Pg. 5, lines 9-14: In deposition an MMP officer have since admitted they knew at the time they hired Finnie that this would cause a row with MEBA and they expected litigation; however, Finnie had no knowledge whatsoever of this when he was hired.

APPENDIX EXHIBIT C (PAGE 3 OF 3)

Pg. 5, line 21 to pg. 6, line 5: When MEBA's officers ordered him off the ship, they did not explain the history of the sham ownership change or the lockout of MEBA members; they only told Finnie "we don't have a contract and we are instructing you not to sail the ship until such time as we do." Finnie told the officers that if MEBA did not have a contract then it looked to him like MEBA's attempt to prevent the ship from sailing was illegal and he didn't want any part of any illegality; he also told them that he felt a moral obligation to keep his promise to sail the ship to San Francisco.

Pg. 7, lines 2-3: Finnie did not "have" to leave the ship on its arrival in San Francisco on May 12, 1979. He left the ship, and the employ of CALRICE, to commence his long-planned employment as a shore consultant with a company known as AMPAC, for whom he commenced working on May 15, 1979.

Dated: October 7, 1989.

/ss/
Dennis Kruszynski
Cartwright, Slobodin & Sucherman
Attorneys for Petitioner,
Robert N. Finnie

APPENDIX EXHIBIT D (PAGE 1 OF 5)

REPORTER'S TRANSCRIPT OF ORAL HEARING BEFORE JUDGE LUCY McCABE ON UNION'S MOTION TO DISMISS, HELD OCTOBER 26, 1986 (CALIFORNIA SUPERIOR COURT)

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Attorneys for Petitioner,
Robert N. Finnie

Reporter's Transcript of Hearing Held October 26, 1986

SUPERIOR COURT OF THE STATE OF CALIFORNIA
CITY AND COUNTY OF SAN FRANCISCO

ROBERT N. FINNIE,

Petitioner,

vs.

DISTRICT NO. 1 - PACIFIC COAST DISTRICT, MARINE ENGINEERS BENEFICIAL ASSOCIATION, et al.,

Respondents.

No. 780-847

Reporter's Transcript of Hearing Held Before Judge Lucy McCabe re Union's Motion to Dismiss (Hearing Date: October 26, 1986)

PROCEEDINGS
October 26, 1986
10:30 A.M. Calendar

APPENDIX EXHIBIT D (PAGE 2 OF 5)

DENNIS KRUSZYNSKI, ESQ., appearing for petitioner Robert N. Finnie.

ALLAN BROTSKY, ESQ., appearing for respondents District No. 1 — Pacific Coast District, Marine Engineers Beneficial Association, et al.

THE COURT: Line 30, *Finnie v. District 1*. I want to first of all congratulate you for being able to get so much in 20 pages.

MR. KRUSZYNSKI: Thank you.

THE COURT: Let me tell you how I analyzed this, and then you can address what my concerns are. First of all, this is very complicated. And opinions of the Supreme Court have not made this any less complicated. I started with the *ABC* case. The U.S. Supreme Court decision, it seems to me, squarely puts this in to 8(b)(1)(B).

MR. BROTSKY: That's correct.

THE COURT: Once it is in 8(b)(1)(B), then not only *Garmon*, but more importantly — I guess I'd better do a footnote here, the *Gonzales* case. Oh, after all this, I felt that I was really stuck with this. And I think, in fact, it's preempted.

MR. BROTSKY: Very well. I didn't hear the last thing you said, Judge. It is in fact what?

THE COURT: Preempted.

MR. BROTSKY: Yes. Absolutely.

MR. KRUSZYNSKI: Your honor, in connection with whether *ABC v. Writers Guild* is squarely within 8(b)(1)(B), we don't feel it is because we don't agree with the fundamental premise of a union that — and ends where

APPENDIX EXHIBIT D (PAGE 3 OF 5)

plaintiff was supervising or a representative within the meaning of the NLRA, as we submitted in our papers.[1]

THE COURT: But it doesn't begin and end there. It does end with an answer that — the factual situation, where it can be considered, that coercion of the employer is in fact the purpose of all this.

MR. KRUSZYNSKI: Okay. We feel that addressing specifically that point, we feel that in view of the affidavit or declaration of Mr. Finnie attached, there could not arguably be a showing of coercion or restraint upon the employer, in that the discipline of Mr. Finnie occurred after he worked for Calrice. In fact, the union's dispute with Calrice — it was decided before he was expelled. He'd intended, as his declaration covered, he had secured a sure job with Ampac. Nobody asks about his job with Ampac. He took this 2-month job on the "Valerie." On May 12, he resigned. 3 days later, he is working for Ampac. The union's disciplinary proceedings did not, in any way, have any coercive effect on Calrice. He was expelled the following September. The whole disciplinary procedure didn't commence until he'd already resigned. I don't see that there is any contention here, arguably, that there was coercion on Calrice in their hiring of Mr. Finnie.

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[1] This sentence appears to be an incomplete and garbled transcript of what was said. The recollection of Finnie's counsel is that he actually said, "Your Honor, in connection with whether *ABC v. Writers Guild* puts us squarely within 8(b)(1)(B), we don't feel it does because we don't agree with the fundamental premise of the union that the inquiry begins and ends with whether plaintiff was a supervisory representative within the meaning of the NLRA, as we submitted in our papers."

APPENDIX EXHIBIT D (PAGE 4 OF 5)

THE COURT: I took as true everything in that declaration. I don't think it makes any difference under the law. I just don't.

MR. KRUSZYNSKI: Is it —

THE COURT: At that point, I asked my law clerk for the petition — and we couldn't find volume one — of which I am looking at one now. I want to thank you for getting it over here so quickly. But I just don't think it makes any difference under the U.S. Supreme Court cases.

MR. KRUSZYNSKI: Even though the crux of this matter was not the union-employer relationship and Calrice, but solely the problem with Finnie long after?

THE COURT: Yes. I mean, the Union-Calrice conflict was over. I hate to characterize the crux of this thing, but it seems to me undisputed that the purpose of the order to Mr. Finnie was to coerce the employer. And whatever happened later, whether they gave that up, I don't have any idea of what happened after that. But that is what happened on day one. And that, to me, is the crux of this.

MR. BROTSKY: Shall I prepare the order?

THE COURT: I don't know if he wants to say anything else.

MR. BROTSKY: All right.

MR. KRUSZYNSKI: I think that all these issues have been well briefed. We feel that the fact that the discipline occurred later, is quite —

THE COURT: Determinative. And I don't think it is.

MR. BROTSKY: [sic: should read "MR. KRUSZYNSKI:"] I would make reference to two Ninth Circuit

APPENDIX EXHIBIT D (PAGE 5 OF 5)

cases, both this year, which held that the crucial two-prong findings be made to establish NLRB in a union jurisdiction of a supervising representative.[2] And those cases specifically are the —

MR. BROTSKY: Why didn't he cite those in his brief?

MR. KRUSZYNSKI: It was limited.

THE COURT: He was already past the 20 pages.

MR. BROTSKY: That is true. As a practical matter, that is true.

THE COURT: Mr. Brotsky, would you prepare the order, please, and a statement of decision? I think you have the gist of what —

MR. BROTSKY: Yes, I have, your honor.

THE COURT: Thank you.

MR. BROTSKY: It will be the formal judgment.

THE COURT: And if you would submit it please to opposing counsel for approval as to form. It should be brief. I don't want lots of other stuff.

MR. KRUSZYNSKI: Thank you.

THE COURT: Thank you.

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[2] This again appears to be a garbled and incomplete transcript of what was sait. The recollection of Finnie's counsel is that he said, "I would make reference to two Ninth Circuit cases, both this year, which held that crucial two-prong findings must be made to establish NLRB jurisdiction over discipline of a supervisory representative."

APPENDIX EXHIBIT E (PAGE 1 OF 2)

UNION'S WRITTEN DISCIPLINARY CHARGES AGAINST FINNIE DATED JUNE 2, 1979.

We the undersigned members do hereby charge Robert N. Finnie, Jr., a member of D-1, PCD-MEBA with having violated his oath of obligation and the following provisions of the Constitution of the National MEBA: Article 13, Section 2 of the National Constitution and Article 7, Section 1 and Section 3 of the Constitution for Districts.

The specific facts upon which the charges are based are as follows:

On March 23, 1979, prior to 12 noon, Robert N. Finnie, Jr., chief engineer of the motor vessel Valerie F., Lloyd Cromwell, D-1, PCD-MEBA Representative in Jacksonville, Florida, and myself, A.P. Sasso, Vice President, Gulf Coast Area, D-1, PCD-MEBA, Robert McDonald, former chief engineer of the motor vessel Valerie F, Herbert Gulden, retired MEBA member and John Parker, a licensed marine engineer, were discussing the breach of our contract covering the motor vessel Valerie F and the dispute between the owners of the vessel and the union. Mr. Finnie was informed of the fact that we did not have a contract and was instructed not to move the Valerie F until such time as we did, as the engineers being supplied by the company to the vessel were neither members nor applicants of D-1, PCD-MEBA. Mr. Finnie informed me he would give consideration to my request.

On March 23, 1979, about 3PM of that same day, Mr. Finnie signed on Foreign Articles of the motor vessel Valerie F as shown to me by Mr. John Koehler, Deputy U.S. Shipping Commissioner in Jacksonville, Florida.

APPENDIX EXHIBIT E (PAGE 2 OF 2)

That evening about 7PM, I returned to the Valerie F alone and boarded the vessel to speak to Mr. Finnie. I located him in the engine room supervising the fueling of the vessel. I pointed out the violations of the constitution of the National MEBA to him if he sailed the vessel, and asked him to consider his position. The vessel's captain appeared and I was ordered from the ship. In leaving, I requested Mr. Finnie meet me on the dock which he refused to do. I stayed on the dock until 12 midnight and at no time did Mr. Finnie appear.

On March 26, 1979, Mr. Henry Borello, D-1, PCD-MEBA Representative in San Francisco sent a telegram to Mr. Finnie to call him collect, relative to Mr. Finnie's sailing the motor vessel Valerie F.

Efforts were also made by Lloyd Cromwell, Jacksonville Representative, and J. L. Bonnot, Jr., New Orleans Patrolman, to contact Mr. Finnie in the following week and talk to him — all to no avail.

On April 7, 1979, the Valerie F sailed from Jacksonville, Florida, with Robert N. Finnie, Jr. as Chief Engineer and a non MEBA crew of engineers.

This irresponsible action on the part of Brother Finnie is a violation of his oath of obligation as a member and also constitutes a violation of Article 13, Section 2 of the National Constitution and Article 7, Section 1 and Section 3 of The Constitution for Districts.

/ss/
A. P. SASSO
J. L. BONNOT, JR.

APPENDIX EXHIBIT F (PAGE 1 OF 2)

LETTER DATED JUNE 8, 1979 TO ROBERT N. FINNIE FROM MEBA VICE PRESIDENT A.P. SASSO, ENCLOSING COPY OF WRITTEN DISCIPLINARY CHARGES.

District No. 1—Pacific Coast District, MEBA
(AFL-CIO)
881 Carondelet Street
New Orleans, Louisiana 70130
(405) 523-1884

June 8, 1979

Mr. Robert N. Finnie, Jr.
33 Ridge Avenue
San Rafael, CA 94901

Dear Sir and Brother:

This is to advise you that written charges, a copy of which is enclosed, were filed against you, presented to the membership at the regular meetings held the week of June 4, through June 8, 1979, and accepted for processing under the National Constitution.

A Trial Committee was elected by the membership meeting of this Branch to hold a hearing on these charges.

The date and place for the hearing has been fixed as July 9, 1979, at 10AM at 811 Carondelet Street, New Orleans, Louisiana.

At the hearing you may, if you desire, be represented by counsel who must be a member of MEBA and you will

APPENDIX EXHIBIT F (PAGE 2 OF 2)

have full opportunity to present any oral testimony or written documents in support of your position and to cross examine any witnesses appearing in support of the charges.[1]

All communications for the Trial Committee should be sent to A. P. Sasso for transmittal.

A copy of the National Constitution and the By-Laws of District No. 1 is enclosed for your examination as to your rights thereunder. Specific reference is made to Article IX of the Appendix.

Fraternally yours,

/ss/
A.P. Sasso
Vice President, Gulf Coast Area

[1] The union constitution purportedly guarantees right of counsel, but it also adds the onerous requirement that the counsel must also be a marine engineer and a member of MEBA. Finnie was never able to locate, anywhere in the United States, an attorney who was also a marine engineer and a member of MEBA, who did not work for MEBA. This unreasonable requirement effectively deprived him of counsel altogether.

APPENDIX EXHIBIT G (PAGE 1 OF 3)

LETTER DATED JUNE 28, 1979 FROM FINNIE TO MEBA ENCLOSING OBJECTIONS TO WRITTEN DISCIPLINARY CHARGES

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28 June 1979

Mr. A.P. Sasso, Vice President
Gulf Coast
District No. 1 - Pacific Coast District
MEBA (AFL-CIO)
811 Carondelet Street
New Orleans, LA 70130

Dear Mr. Sasso:

Reference is made to your letter dated June 8, 1979 to the charges referred to in that letter, and to those same charges enclosed in your Express Mail correspondence of June 19, 1979.

Enclosed is my response to those charges which I request be transmitted to the Trial Committee at the appropriate time.

Sincerely,

/ss/
Robert N. Finnie

APPENDIX EXHIBIT G (PAGE 2 OF 3)

RESPONSE OF ROBERT N. FINNIE TO MEBA CHARGES RE SERVICE ON VALERIE F

I object to the notice of hearing and the charges against me under Article 13, Section 2 of the National Constitution and under Article 7, Section 1 and Section 3 of the Constitution For Districts on the following grounds:

(1) My employment on the VALERIE F occurred, among other places, in San Francisco, California. I am entitled to be tried in the district where the alleged offense was committed. I am unable to and cannot afford to travel to New Orleans from my home in the San Francisco area to respond to these charges, and I allege that the attempt to try me in New Orleans is a form of harassment in violation of Article 9, Section 2 of the Constitution for Districts.

(2) The charges are overly broad in that nowhere is it specified what portions of the above Constitution provisions are alleged to have been violated, all in violation of Article 9, Section 2 of the Constitution For Districts.

(3) The specification of charges served on me is general and does not advise me how it is alleged I violated MEBA's Constitution, all in violation of Article 9, Section 2(a) of the Constitution for Districts.

(4) Article 9, Section 3 of MEBA's Constitution For Districts deprives me of counsel of my choice, all in violation of my federal constitutional rights.

APPENDIX EXHIBIT G (PAGE 3 OF 3)

Accordingly, I request that these charges be dismissed; alternatively, I request that the hearing be moved to San Francisco, California. Further, if these requests are denied, I request a transcript of all proceedings, pursuant to Article 9, Section 2(j) of the Constitution for Districts.

Respectfully submitted,

/ss/
Robert N. Finnie, Jr.

APPENDIX EXHIBIT H (PAGE 1 OF 7)

REPORTER'S TRANSCRIPT OF UNION TRIAL HELD IN NEW ORLEANS ON JULY 9, 1979.

The Trial Committee in regard to charges against Robert N. Finnie convened at 10:00 a.m., July 9, 1989 at the District 1 Pacific Coast District MEBA Union Hall, 811 Carondelet Street, New Orleans, Louisiana, and immediately recessed to allow time for Mr. Finnie to appear. Meeting shall reconvene at 10:15 a.m.

Present: O. W. "Bill" Anyan, Alternate; Stanley Barras, Trial Committee Member; Herbert Bush, Trial Committee Member; Charles Michalik, Trial Committee Member; A. P. Sasso, Witness.

The Trial Committee reconvened at 10:20 a.m. on July 9, 1979, after waiting twenty minutes for the appearance of Mr. Finnie.

SASSO: My name is A. P. Sasso, Branch Agent of the Port of New Orleans and vice-president for the Gulf Coast Area. I am also a member of this union, and I, and James L. Bonnot have filed the charges against Mr. Finnie. At this time I would like to present to the Trial Committee a copy of the charges and a copy of my letter to Mr. Finnie indicating that the charges had been presented to the membership and referred to a Trial Committee. At this time I am a witness, and if the Trial Committee has any questions in regard to the charges I shall be happy to answer them.

BARRAS: Could the man have had, or thought he had, permission from anyone to sail this ship?

SASSO: The gentleman was made aware of the fact that we did not have a contract and he was in violation of the constitution of this union.

APPENDIX EXHIBIT H (PAGE 2 OF 7)

ANYAN: Did he give any reason why he did not meet with you and Mr. Bonnet on the dock?

SASSO: Henry Borello, the Branch Agent in San Francisco, sent telegrams to Mr. Finnie, and at this time I would like to present them to the Trial Committee as Exhibit B; my charges being Exhibit A. Mr. Borello is the Branch Agent of the San Francisco Branch of D-1, PCD, MEBA, and due to the traveling involved he could not be present, but the copies of the telegrams serve as evidence.

ANYAN: Finnie did not give any excuse as to why he did not meet with you?

SASSO: That night aboard the vessel when I spoke to him Mr. Finnie stated: "I have an obligation to move the vessel because I promised I would."

BUSH: That promise was made to the company?

SASSO: And MM&P, yes.

BARRAS: This looks like a pretty clear-cut violation of our contract, and the man is not here to answer for himself, so I don't know...

SASSO: Stanley, he was offered every opportunity...

BARRAS: And recognizing this letter here, it will be up to us to make recommendations, and he be given a chance to answer these charges?

SASSO: Stanley, if you will, at this time we can introduce his letter as Exhibit C.

BARRAS: Oh, I thought this was all here.

SASSO: No, that letter has not been placed in evidence. I am the witness on the stand at the present time and when you are all through questioning me we can submit his letter and his statement and then, of course, again ask questions and ask me to refute his letter.

BUSH: I agree that the charges are self-explanatory and extremely clear.

APPENDIX EXHIBIT H (PAGE 3 OF 7)

MICHALIK: You located him in the engine room ...right?

SASSO: Yes.

MICHALIK: ...that afternoon, and they were taking on fuel and later on the captain ordered you from the ship?

SASSO: Yes.

MICHALIK: Mr. Finnie was supposed to come out on the dock and see you later?

SASSO: No, he refused to come out on the dock. He flatly refused.

BARRAS: When the captain asked you to leave the ship did he know who you were?

SASSO: Yes.

BARRAS: Did Mr. Finnie know the captain ordered you off the ship?

SASSO: Yes, he was present.

ANYAN: When he told you he had a commitment to move the ship...

SASSO: He said he had an obligation.

ANYAN: When he said he had an obligation to move the ship did he say after he met that obligation he would meet to try to thrash things out?

SASSO: No.

ANYAN: Well, he didn't intend to meet you under no circumstances. I can see if a man's got an obligation he wants to keep his word, but as soon as that obligations met then he could probably leave it and have the differences ironed out, but he didn't even offer to leave at no time.

MICHALIK: I think we should make a move to accept these charges as written.

APPENDIX EXHIBIT H (PAGE 4 OF 7)

SASSO: If the Trial Committee is through questioning me, I would like to submit Mr. Finnie's letter to the Trial Committee, letter dated June 28, 1979, and is the response of Robert N. Finnie to MEBA charges re service on Valerie F. If anything Mr. Finnie brings out creates any doubt in your mind please feel free to ask any and all questions.

BARRAS: I have a question about his allegation here in Section I. He says, among other things, in San Francisco. . .before he went to this ship was he in San Francisco, California on this ship?

SASSO: I have no idea where he was.

BARRAS: The violation was in Florida, where he was asked not to get on the ship, and I don't see where he had the right to go to San Francisco, and, you know, buddy-buddy deal, something like that. I think he should be tried before the membership and the guy has been given a chance to answer any charges. He has. I think we have enough to go on. I don't know the man myself.

SASSO: The Constitution is very explicit. It says he must be tried in the district not in the port, and this is District 1.

BARRAS: So I don't see where he has anything to say about other places, San Francisco, California -- he was in San Francisco long before these other allegations took place.

SASSO: The charges that I presented to the membership, if you will read them, please note that they refute every one of the allegations herein and cite some specific section of the constitution, national or district.

ANYAN: Paragraph 4 says he is entitled to counsel of his choice...I don't see...says in there he has got to

APPENDIX EXHIBIT H (PAGE 5 OF 7)

be a member of the MEBA. Yeah, well, I can't see we refused him choice of his counsel.

BARRAS: We are under no obligation to provide him one are we?

SASSO: No, he has to get his own.

BARRAS: Well, when he won't even get her himself, what's the use of counsel. I know about income, as far as expenses involved, and what I make, and most of us make, and the expense of coming from San Francisco — question kind of moot.

SASSO: This is James L. Bonnot, Patrolman, Union Representative for District 1, Pacific Coast District, MEBA, place of employment is here in New Orleans, Louisiana.

BARRAS: What happened after you made contact with Mr. Finnie?

BONNOT: Let me get the papers. Late Saturday night, March 31, 1979, or wee hours of Sunday morning I drove down to Adams Terminal and since I didn't want to be conspicuous in the middle of the night since they knew who Tony was I was trying to keep them from finding out who I was. I went into the bar and had a couple of beers, checked around to see if any of the engineers were there. I couldn't get any information on anybody so I went back to the motel. The next day, Sunday morning, returned to the bar there, one or two people in it, but I couldn't find any information so I went down to Blount Island and talked to the MEBA representative of Jacksonville, Lloyd Cromwell. We just discussed where the ship was and what he had been doing. Then late on that day went back to Adams Terminal, went to the ship and got to the gangway, they told me no visitors were allowed, I was turned away from the ship. Later on

APPENDIX EXHIBIT H (PAGE 6 OF 7)

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that evening, after supper, I returned to this bar outside the gate but unable to gather any information at that time. The only thing I could find out was that they were getting ready to sail but nobody knew when. On Monday morning, on the way to the Union Hall, I drove past Adams Terminal to see if the ship was there. Arriving at the Union Hall, I found out from Lloyd Cromwell that two engineers had signed on the Valerie F during the weekend.

SASSO: Our main concern is, was Mr. Finnie aboard when she sailed out of Jacksonville.

BONNOT: The next time I went down to the ship was Tuesday morning. I went to the bar on Monday evening, trying to find out where Mr. Finnie was from the engineers. On Tuesday morning I drove in and attempted to get aboard the ship to talk to Mr. Finnie and the rest of the engineers, and at the top of the gangway one of the mates and security guard looked at me and all they said was "no way." That was the last attempt I made to get aboard the ship.

BARRAS: You didn't get to talk to him at all?

BONNOT: Just got to talk to two of the engineers, that's all.

ANYAN: On Sunday, the first time you tried to board the ship, did they give you any reason why they didn't allow visitors?

BONNOT: You had to have special permission; they didn't tell me why you had to have special permission to get aboard and I assumed it had to be either from the MM&P or company.

ANYAN: At that time, they didn't know who you were though, whether you were a union representative or just someone visiting?

APPENDIX EXHIBIT H (PAGE 7 OF 7)

BONNOT: Just someone who wanted to visit. Anything else?

BARRAS: That's the only question I have.

SASSO: As the accuser, I have read Mr. Finnie's letter responding to our charges and I reiterate my previous statement that his response is unfounded and that everything he states has been covered in the charges which I have presented to the membership. At this time, if the Trial Committee has no more questions, I would suggest they go into Executive Session and make their decision.

****

FINDINGS OF TRIAL COMMITTEE

Herbert Bush, Chairman
Stanley Barras and Charles Michalik, Members
O. W. "Bill" Anyan, Alternate

Let the record show that the Trial Committee went into Executive Session at 10:45 a.m. and concluded at 11:05 a.m. The findings of the Committee are:

We, the undersigned, find Robert N. Finnie, Jr. guilty as charged in Exhibit A. We find the degree of punishment to be dropped form the rolls of membership as prescribed in Article X, Section II, Page G of the Constitution for Districts.

/ss/
HERBERT S. BUSH
STANLEY J. BARRAS
CHARLES MICHALIK
ALTERNATE, O. W. ANYAN

APPENDIX EXHIBIT I (PAGE 1 OF 5)

REPORT OF TRIAL COMMITTEE RE UNION TRIAL HELD IN NEW ORLEANS ON JULY 9, 1979.

REPORT OF TRIAL COMMITTEE
In Re: Charges Against Robert N. Finnie, Jr.
July 9, 1979

Written charges were duly filed in the Port of New Orleans, La., signed by members A. P. Sasso and J. L. Bonnot, Jr., against Robert N. Finnie, Jr. These charges read as follows:

> We the undersigned members do hereby charge Robert N. Finnie, Jr., a member of D-1, PCD-MEBA with having violated his oath of obligation and the following provisions of the Constitution of the National MEBA: Article 13, Section 2 of the National Constitution and Article 7, Section 1 and Section 3 of the Constitution for Districts.

The specific facts upon which the charges are based are as follows:

On March 23, 1979, prior to 12 noon, Robert N. Finnie, Jr., chief engineer of the motor vessel Valerie F, Lloyd Cromwell, D-1, PCD-MEBA Representative in Jacksonville, Florida, and myself, A.P. Sasso, Vice President, Gulf Cost Area, D-1, PCD-MEBA, Robert McDonald, former chief engineer of the motor vessel Valerie F, Herbert Gulden, retired MEBA member and John Parker, a licensed marine engineer, were discussing the breach of our contract covering the motor vessel Valerie F and the dispute between the owners of the vessel and the union. Mr. Finnie was informed of the fact

APPENDIX EXHIBIT I (PAGE 2 OF 5)

that we did not have a contract and was instructed not to move the Valerie F until such time as we did, as the engineers being supplied by the company to the vessel were neither members nor applicants of D-1, PCD-MEBA. Mr. Finnie informed me he would give consideration to my request.

On March 23, 1979, about 3PM of that same day, Mr. Finnie signed on Foreign Articles of the motor vessel Valerie F as shown to me by Mr. John Koehler, Deputy U.S. Shipping Commissioner in Jacksonville, Florida.

That evening, about 7PM, I returned to the Valerie F alone and boarded the vessel to speak to Mr. Finnie. I located him in the engine room supervising the fueling of the vessel. I pointed out the violations of the constitution of the National MEBA to him if he sailed the vessel, and asked him to reconsider his position. The vessel's captain appeared and I was ordered from the ship. In leaving, I requested Mr. Finnie meet me on the dock which he refused to do. I stayed on the dock until 12 midnight and at no time did Mr. Finnie appear.

On March 26, 1979, Mr. Henry Borello, D-1, PCD-MEBA Representative in San Francisco sent a telegram to Mr. Finnie to call him collect, relative to Mr. Finnie's sailing the motor vessel Valerie F.

Efforts were also made by Lloyd Cromwell, Jacksonville Representative, and J.L. Bonnot, Jr., New Orleans Patrolman, to contact Mr. Finnie in the following week and talk to him -- all to no avail.

On April 7, 1979, the Valerie F sailed from Jacksonville, Florida with Robert N. Finnie, Jr., as chief engineer and a non MEBA crew of engineers.

APPENDIX EXHIBIT I (PAGE 3 OF 5)

This irresponsible action on the part of Brother Finnie is a violation of his oath of obligation as a member and also constitutes a violation of Article 13, Section 2 of the National Constitution and Article 7, Section 1 and Section 3 of the Constitution for Districts.

The charges were presented to the regular membership meetings of the District held during the week of June 4, through June 8, 1979, and by a vote of 504 to 0 were accepted to be processed. At the membership meeting held in the port of New Orleans on June 6, 1979, the following members were elected to serve on the Trial Committee: Herbert Bush, Charles Michalik, Stanley Barras, Alternates O. W. Anyan and James Quinn.

Under certified letter dated June 8, 1979, the charged member was duly notified of the charges which had been filed, and that 10AM, Monday, July 9, 1979, was the time and day designated and 811 Carondelet Street, New Orleans, Louisiana as the place for the hearing before the Trial Committee. A copy of the charges and of the National Constitution and By-Laws of D-1, PCD-MEBA were enclosed. Said letter was mailed to the last known address of the charged member.

A copy of said letter was submitted for the Record and marked as Exhibit A.

The Trial Committee comprised of the undersigned members started its hearing on July 9, 1979, at 10AM and immediately recessed to await the appearance of Mr. Finnie. As Mr. Finnie did not appear by 10:20AM of that day, the Trial Committee reconvened. There were present the following: Herbert Bush, T.C.M., Charles Michalik, T.C.M., Stanley Barras, T.C.M., O.W. Anyan, Alternate T.C.M., A.P. Sasso, the New Orleans Branch

APPENDIX EXHIBIT I (PAGE 4 OF 5)

Agent, Witness, and J.L. Bonnot, Jr., Patrolman, Witness.

The members who filed the charges were then invited to present evidence in support. Telegrams from Henry Borello, San Francisco Representative to Robert N. Finnie were presented as Exhibit B.

The charged member was not present and the Trial Committee questioned the accusers in regards to the evidence pro and con.

A letter from the accused was introduced into the Record as Exhibit C.

The facts revealed in the record are as follows:

Brother Robert N. Finnie was aware that his actions were in direct violation of the National Constitution and the Constitution for Districts having been informed so by Brother A. P. Sasso, the New Orleans Branch Agent in front of witnesses while on the dock along side the motor vessel Valerie F, in Jacksonville, Florida.

The hearing was adjourned on July 9, 1979, at 10:45AM. The Trial Committee then went into executive session to consider the record and make their decision.

The Trial Committee, on the basis of the full record presented hereby finds:

> The charge that the accused member violated Article 13, Section 2 of the National Constitution and Article 7, Section 1 and Section 3 of the Constitution for Districts, in that on April 7, 1979, the Valerie F sailed from Jacksonville, Florida, with Robert N. Finnie, Jr. as chief engineer and a non-MEBA crew of engineers be upheld and the accused member is found guilty of the charge as presented.

APPENDIX EXHIBIT I (PAGE 5 OF 5)

The penalty to be imposed for such violation is that Brother Robert N. Finnie shall be dropped from the roll of membership.

/ss/
HERBERT BUSH, T.C.M.
CHARLES MICHALIK, T.C.M.
STANLEY J. BARRAS, T.C.M.
O. W. ANYAN, Alternate T.C.M.

APPENDIX EXHIBIT J (PAGE 1 OF 2)

SUMMARY OF RECORD RE UNION TRIAL HELD IN NEW ORLEANS ON JULY 9, 1979.

SUMMARY OF RECORD
IN PROCEEDINGS OF TRIAL OF
ROBERT N. FINNIE, JR.
August 9, 1979

Charges were filed by two members against Brother Finnie. The charges alleged violation of Article Thirteen, Section 2, of the National MEBA Constitution and Article Seven, Sections 1 and 3 of the Constitution for Districts.

The charges were accepted by regular District membership meetings, and a Trial Committee was elected at the New Orleans Branch membership meeting. Brother Finnie was notified in a timely fashion of the charges and specifications and the time, date, and place of trial but failed to appear.

The charges were supported by specifications which alleged as follows:

1) On March 23, 1979, Brother Finnie, Chief Engineer of the
M/V Valerie F was advised that we did not have a contract and was instructed not to move the vessel until we did have a contract, as the engineers being supplied by the company to the vessel were neither members nor applicants of D1-PCD, MEBA.

2) Later that same day, Brother Finnie signed foreign articles on the vessel in Jacksonville, FL.

3) During the evening of March 23, 1979, Gulf coast Vice President A. P. Sasso visited the vessel. He pointed out the violations of the National MEBA Constitution to

APPENDIX EXHIBIT J (PAGE 2 OF 2)

Brother Finnie — if he sailed the vessel — and requested him to reconsider his position.

4) Subsequent attempts by several other MEBA representatives to discuss Brother Finnie's sailing of the vessel were unsuccessful.

On the basis of the entire record, the Trial Committee found Brother Finnie guilty of the charges as presented. The penalty to be imposed for such violation is that Brother Robert N. Finnie, Jr, shall be dropped from the role of membership.

APPENDIX EXHIBIT K (PAGE 1 of 19)

COMPLAINT FILED AGAINST CALRICE BY NLRB GENERAL COUNSEL ON JUNE 25, 1979

NLRB General Counsel, by
Natalie P. Allen, Regional Director
National Labor Relations Board, Region 20
450 Golden Gate Avenue, Box 36047
San Francisco, California 94102

Filed June 25, 1979

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

Rice Growers Association of California; California Rice Transport, Inc., a wholly-owned subsidiary of Rice Growers Association of California; LJT Marine Services International, Inc. and Marine Engineers Beneficial Association, District No. 1, PCD, AFL-CIO; Sailors Union of the Pacific, Seafarers International Union of North America, AFL-CIO; Marine Cooks and Stewards Union, Seafarers International Union of North America, AFL-CIO; Pacific Coast Marine Firemen, Oilers, Watertenders and Wipers Association, Seafarers International Union of North America, AFL-CIO and International Organization of Masters, Mates, and Pilots, International Longshoremen's Association, AFL-CIO, Party to the Contract.	Case No. 20-CA-14589

APPENDIX EXHIBIT K (PAGE 2 OF 19)

International Organization of Masters, Mates and Pilots, International Longshoremen's Association, AFL-CIO and Pete Pokrajac, An Individual and Rice Growers Association of California; California Rice Transport, Inc., a wholly-owned subsidiary of Rice Growers Association of California; LJT Marine Services International, Inc., Party to the contract.	Case No. 20-CB-4873

ORDER CONSOLIDATING CASES, CONSOLIDATED COMPLAINT, AND NOTICE OF HEARING

It having been charged in Case No. 20-CA-14589, by Marine Engineers Beneficial Association, District No. 1, PCD, AFL-CIO, herein called "MEBA"; by Sailors Union of the Pacific, Seafarers International Union of North America, AFL-CIO, herein called "SUP"; by Marine Cooks and Stewards Union, Seafarers International Union of North America, AFL-CIO, herein called "MCS"; and by Pacific Coast Marine Firemen, Oilers, Watertenders and Wipers Association, Seafarers International Union of North America, AFL-CIO, also known as the Marine Firemen's Union, and herein called "MFU" or "MFOW," that Rice Growers Association of California, herein called "RCA," California Rice Transport, Inc., a wholly-owned subsidiary of RCA, herein called "CRT," and LJT Marine Services International, Inc., herein called "LJT," and it having been charged in Case No. 20-CB-4873 by Pete

APPENDIX EXHIBIT K (PAGE 3 OF 19)

Pokrajac, an individual, that International Organization of Masters, Mates, and Pilots, International Longshoremen's Association, AFL-CIO, herein called "MMP, have engaged in, and are engaging in, certain unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C., Sec. 151, et seq., herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board, by the undersigned Regional Director for Region 20, having duly considered the matter and deeming it necessary in order to effectuate the purposes of the Act, and to avoid unnecessary costs or delay.

HEREBY ORDERS, pursuant to Section 102.33(c) of the Board's Rules and Regulations, SEries 8, as amended, that Cases Nos. 20-CA-14589 and 20-CB-4873 be, and they hereby are, consolidated.

Said cases having been consolidated for hearing, the General Counsel of the Board, on behalf of the Board, by the undersigned Regional Director for Region 20, pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, Series 8, as amended, hereby issues this Consolidated Complaint and Notice of Hearing and alleges as follows:

1. (a) The original charge in Case No. 20-CA-14589 was filed by MEBA, SUP, MCS, and MFOW on May 11, 1979, and a copy thereof was served on MMP, RGA, CRT and LJT, on the same date.

(b) A first-amended charge in Case No. 20-CA-14589 was filed by MEBA, SUP, MCS, and MFOW on

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June 28, 1979, and a copy thereof was served on MMP, RGA, CRT, AND LJT on June 19, 1979.

(c) The original charge in Case No. 20-CB-4873 was filed by Pete Pokrajac on May 25, 1979, and a copy thereof was served on MMP, RGA, CRT and LJT on the same date.

(d) A first-amended charge in Case No. 20-CB-4873 was filed by Pete Pokrajac on June 18, 1979, and a copy thereof was served on MMP, RGA, CRT, and LJT on the same date.

2. (a) At all times material prior to December 22, 1978, Bulk Food Carriers, Inc., herein called "BFC," and its wholly-owned subsidiary, Intercoastal Bulk Carriers, Inc. herein called "IBC," each with a place of business in San Francisco, California, have owned and operated a vessel, the Valerie F., which has been engaged in the interstate transportation of freight and commodities.

(b) During the twelve-month period prior to December 22, 1978, BFC and IBC derived gross revenues in excess of $50,000 for the transportation on the Valerie F of freight and commodities from the State of California directly to points outside the State of California.

(c) At all times material herein, RGA, a California corporation with a place of business in West Sacramento, California, has been engaged in the wholesale sale of rice.

(d) During the past calendar year, in the course and conduct of its business operations, RGA has sold rice valued in excess of $50,000 directly to customers located outside the State of California.

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(e) Since on or about December 22, 1978, RGA has been duly designated by the Bankruptcy Judge of the United States District Court for the Northern District of California as the debtor in possession of the Valerie F, with the provision that the Valerie F was to be managed and operated by BFC during Voyage 12.

(f) On or about February 14, 1979, during Voyage 12, the Valerie F docked in Jacksonville, Florida.

(g) On or about February 16, 1979, pursuant to an Assumption Agreement between BFC/IBC and RGA/CRT, approved by the United States Maritime Administration, RGA and its wholly-owned subsidiary CRT, assumed operation and control of the Valerie F.

(h) On or before February 16, 1979, CRT contracted with LJT to operate and manage the Valerie F.

(i) Since on or about February 16, 1979, RGA, CRT, and LJT have operated the Valerie F in the interstate transportation of freight and commodities.

(j) Since on or about February 16, 1979, RGA, CRT, and LJT have been joint employers with respect to the operation of the Valerie F.

(k) Based upon the gross revenues derived by BFC and IBC from the operation of the Valerie F, it is projected that during the twelve-month period commencing February 16, 1979, RGA, CRT, and LJT will jointly derive gross revenues in excess of $50,000 for the transportation on the Valerie F of freight and commodities from the State of California directly to points outside the State of California or to the State of California directly from points located outside the State of California.

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(l) But for the acts and conduct of RGA, CRT and LJT, described below in paragraphs 12 and 13, RGA, CRT and LJT would have employed, as a majority of its nonsupervisory licensed and unlicensed employees on the Valerie F, individuals who were previously employed on the Valerie F by BFC and IBC during Voyage 12.

(m) By virtue of the circumstances described above in subparagraphs (a), (e), (g), (h), (i), (j) and (l), RGA, CRT, and LJT have continued the employing entity and are successor employers to BFC and IBC with respect to employees employed on the Valerie F.

3. (a) RGA is, and at all times material herein has been, an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

(b) CRT is, and at all times material herein has been, an employer engaged in commerce and in operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

(c) LJT is, and at all times material herein has been, an employer engaged in commerce and operations affecting commerce within the meaning of Section 2(2), (6), and (7) of the Act.

(d) At all times material prior to February 16, 1979, BFC and IBC have been employers engaged in commerce and operations affecting commerce within the meaning of Section 2(2), (6) and (7) of the Act.

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4. (a) At all times material herein, MMP has been an organization in which employees participate and which exists for a purpose of dealing with employers concerning labor disputes, and bargaining collectively with regard to rates of pay, hours of employment, and conditions of work.

(b) At all times material herein, MEBA has been an organization in which employees participate and which exists for a purpose of dealing with employers concerning labor disputes, and bargaining collectively with regard to rates of pay, hours of employment, and conditions of work.

(c) At all times material herein, SUP, MFOW (MFU), and MCS have each been an organization in which employees participate and which exists for a purpose of dealing with employers concerning labor disputes, and bargaining collectively with regard to rates of pay, hours of employment, and conditions of work.

(d) At all times material herein, Seafarers International Union of North America, Pacific District, AFL-CIO, herein called SIU-PD, has been an unincorporated association comprised of constituent labor organizations and has existed for a purpose of representing labor organizations in dealings with employers concerning labor disputes, and bargaining collectively with regard to rates of pay, hours of employment, and conditions of work.

(e) At all times material herein prior to June 10, 1978 Marine Cooks and Stewards Union (MCS) was an autonomous labor organization affiliated with the SIU-PD.

(f) On or about June 10, 1978, MCS merged into the Seafarers International Union of North America,

APPENDIX EXHIBIT K (PAGE 8 OF 19)

Atlantic Gulf, Lakes and Inland Waters District, AFL-CIO, herein called SIU-AG, and since that time SIU-AG has succeeded to MCS's relations with SIU-PD and with BFC and IBC.

(g) At all times herein prior to February 16, 1979, SIU-PD has represented SUp, MFOW (MFU), and MCS/SIU-AG in bargaining with BFC and IBC.

5. (a) At all times material herein, MMP has been a labor organization within the meaning of Section 2(5) of the Act.

(b) At all times material herein, MEBA has been a labor organization within the meaning of Section 2(5) of the Act.

(c) At all times material herein, SIU-PD and its constituent labor organizations SUP. MFOW (MFU), MCS/SIU-AG have each been labor organizations within the meaning of Section 2(5) of the Act.

6. (a) At all times material herein prior to February 16, 1979, the individuals described below have occupied the positions set forth opposite their names and have been agents of BFC and/or IBC, acting on behalf of BFC and/or IBC, within the meaning of Section 2(2) and (13) of the Act, and have been supervisors of BFC and/or IBC within the meaning of Section 2(ll) of the Act:

APPENDIX EXHIBIT K (PAGE 9 OF 19)

(l) Elmo Ferrari
President, BFC and IBC

(2) Captain Stuart Valentine
Vice President for Operations, BFC and IBC

(b) At all times material herein since about February 16, 1979, the individuals below have occupied the positions set forth opposite their names and have been agents of RGA and/or CRT and/or LJT, acting on behalf of RGA and/or CRT and/or LJT, within the meaning of Section 2(11) of the Act:

(1) Donald R. Harrington
President, RGA

(2) Robert W. Freeland
Executive Vice-President and Chief Executive Officer, RGA; President, CRT

(3) Roger H. Stratton
Secretary-Treasurer, RGA;
Chief Financial Officer, CRT

(4) Elmo Ferrari
President, LJT

(5) Captain Stuart J. Valentine
Marine Consultant, LJT

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(c) At all times material herein, the individuals described below employed on the Valerie F have occupied the positions set forth opposite their names and prior to about February 16, 1979, have been agents of BFC and/or IBC, acting on behalf of BFC and/or IBC, within the meaning of Section 2(2) and (13) of the Act, have been supervisors of BFC and/or IBC within the meaning of Section 2(11) of the Act, and, at all times material herein since about February 16, 1979, have been agents of RGA and/or CRT and/or LJT within the meaning of Section 2(11) of the Act:

(1) Captain Russell L. Fowler, Master
(Dec. 27, 1978 - Feb. 15, 1979)

(2) Captain David Cresap, Master
(Mar. 30 - Sept. 13, 1977)
(Feb. 14 - Sept. 2, 1978)
(Feb. 14, 1979 - present)

(3) Hubert Von Rittenberg, Chief Mate
(Dec. 27, 1978 - present)

(4) Robert B. McDonald, Chief Mate
(Dec. 27, 1978 - Jan. 9, 1979)
(Feb. 15, 1979 - Mar. 23, 1979)

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7. At all times material herein, the individuals described below have occupied the positions set forth opposite their names and have been agents of MMP, acting on MMP's behalf, within the meaning of Section 2(13) of the Act:

(1) Allen C. Scott
Executive Vice President

(2) Captain Lloyd M. Martin
International Secretary-Treasurer

8. (a) At all times material herein, all unlicensed seagoing employees employed on the Valerie F, excluding all licensed employees, radio officers, concessionaires and their employees, musicians, doctors, doctors' assistants, nurses, hospital attendants, associate chief stewards, food controllers and auditors of suppliers together with their assistants and apprentices, animal tenders, nut turners, printers and their assistants, guards and supervisors as defined in the Act, have constituted a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

(b) At all times material herein, all nonsupervisory licensed engineers employed on the Valerie F, excluding all other employees, guards and supervisors as defined in the Act have constituted a unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

APPENDIX EXHIBIT K (PAGE 12 OF 19)

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9. (a) At all times material herein, SIU-PD has represented a majority of employees in the unit described above in paragraph 8(a), and by virtue of Section 9(a) of the Act, has been the exclusive representative of all employees for purposes of collective bargaining in the unit described above in paragraph 8(a).

(b) At all times material herein, MEBA has represented a majority of employees in the unit described above in paragraph 8(b), and by virtue of Section 9(a) of the Act, has been the exclusive representative of all employees for purposes of collective bargaining in the unit described above in paragraph 8(b).

10. (a) On or about October 12, 1978, BFC/IBC adopted a collective bargaining agreement between SIU-PD and Pacific Maritime Association, effective on its face from June 16, 1978, to June 15, 198l, to govern the terms and conditions of employment of employees in the unit described above in paragraph 8(a).

(b) On or about July 11, 1978, BFC/IBC entered into a collective bargaining agreement between MEBA, effective on its face from June 16, 1978, to June 15, 198l, to govern the terms and conditions of employment of employees in the unit described above in paragraph 8(b).

11. (a) But for the acts and conduct of RGA, CRT, and LJT described below in paragraphs 12(a) and 13, SIU-PD would have continued after February 16, 1979, to represent a majority of employees in the unit described above in paragraph 8(a).

APPENDIX EXHIBIT K (PAGE 13 OF 19)

(b) But for the acts and conduct of RGA, CRT, and LJT described below in paragraphs 12(b) and 13, MEBA would have continued after February 16, 1979, to represent a majority of employees in the unit described above in paragraph 8(b).

12. (a) Since on or about February 16, 1979, RGA, CRT, and LJT have refused to employ on the Valerie F the employees described below because of their membership in and/or representation by SIU-PD and its constituent organizations:

Peter D. Foti	Homer L. Oliver
Pete Pokrajac	Christopher Harlow
George Vesik	George Kim
Raymond Lidberg	Allen Sun Lean
Raymond C.S. Kim	Jack R. Poole

(b) Since on or about February 16, 1979, RGA, CRT, and LJT have refused to employ Calvin Hall and James Yakas on the Valerie F because of their membership in and/or representation by MEBA.

13. On or about March 18, 1979, RGA, CRT and LJT hired the employees described below and other unidentified employees because of their membership in and/or representation by MMP:

Richard E. Smith	J. Michael Sanders
Ronald W. Roe	Raymond Watts
Arthur M. Avera	Richard E. Orter

APPENDIX EXHIBIT K (PAGE 14 OF 19)

14. (a) Since on or about March 6, 1979, and continuing to date, SIU-PD and its constituent organizations SUP, MFOW (MFU) and MCS/SIU-AG have requested, and are requesting that RGA, CRT, LJT recognize and bargain collectively with SIU-PD and its constituent organizations SUP, MFOW (MFU), and MCS/SIU-AG with respect to wages, hours, and other terms and conditions of employment of employees in the unit described above in paragraph 8(a).

(b) Since on or about March 7, 1979, and continuing to date, MEBA has requested, and is requesting that RGA, CRT, LJT recognize and bargain collectively with MEBA with respect to wages, hours, and other terms and conditions of employment of employees in the unit described above in paragraph 8(b).

15. (a) Since on or about March 6, 1979, and continuing to date, RGA, CRT and LJT have refused and are refusing to recognize and bargain collectively with SIU-PD and its constituent organizations SUP, MFOW (MFU), and MCS/SIU-AG with respect to wages, hours, and other terms and conditions of employment of employees in the unit described above in paragraph 8(a).

(b) Since on or about March 7, 1979, and continuing to date, RGA, CRT and LJT have refused and are refusing to recognize and bargain collectively with MEBA with respect to wages, hours, and other terms and conditions of employment of employees in the unit described above in paragraph 8(b).

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16. At no time material herein has MMP represented an unassisted majority of employees employed on the Valerie F in any unit appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

17. (a) On or about March 22, 1979, under the circumstances described above in paragraph 16, RGA, CRT, and LJT recognized MMP as the representative of the unlicensed seagoing employees on the Valerie F for purposes of collective bargaining with respect to wages, hours, and other terms and conditions of employment.

(b) On or about March 14, 1979, under the circumstances described above in paragraph 16, RGA, CRT, and LJT recognized MMP as the representative of the licensed seagoing employees on the Valerie F for purposes of collective bargaining with respect to wages, hours, and other terms and conditions of employment.

18. (a) On or about March 22, 1979, MMP accepted recognition from RGA, CRT and LJT as representative of the unlicensed seagoing employees on the Valerie F for purposes of collective bargaining with respect to wages, hours, and other terms and conditions of employment.

(b) On or about March 14, 1979, MMP accepted recognition from RGA, CRT and LJT as representative of the licensed seagoing employees on the Valerie F for purposes of collective bargaining with respect to wages, hours, and other terms and conditions of employment.

APPENDIX EXHIBIT K (PAGE 16 OF 19)

19. On or about March 22, 1979, RGA, CRT, and LJT executed a Memorandum of Agreement with MMP, covering unlicensed seagoing employees on the Valerie F, effective on its face as of March 22, 1979, and which contained a union security provision.

20. On or about March 22, 1979, RGA, CRT, and LJT executed a Memorandum of Agreement with MMP, covering licensed seagoing employees on the Valerie F, effective on its face as of March 14, 1979.

21. The acts and conduct of RGA, CRT, and LJT described above in paragraphs 17 and 20, and each of said acts, occurring in conjunction with the circumstances described above in paragraphs 2, 4(a), 5(a), 13, and 16, and in connection with the operations of RGA, CRT, and LJT described above in paragraphs 2 and 3, constitute unfair labor practices affecting commerce within the meaning of Section 8(a)(2) and (1) and Section 2(6) and (7) of the Act.

22. The acts and conduct of RGA, CRT, and LJT described above in paragraph 19, occurring in conjunction with the circumstances described above in paragraphs 2, 4(a), 5(a), 13, and 16, and in connection with the operations of RGA, CRT, and LJT described above in paragraphs 2 and 3, constitute unfair labor practices affecting commerce within the meaning of Section 8(a)(1) (2) and (3) and Section 2(6) and (7) of the Act.

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23. The acts and conduct of RGA, CRT, and LJT described above in paragraph 13, and each of said acts, occurring in conjunction with the operations of RGA, CRT, and LJT described above in paragraphs 2 and 3, constitute unfair labor practices affecting commerce within the meaning of Section 8(a)(1), (2) and (3) and Section 2(6) and (7) of the Act.

24. The acts and conduct of RGA, CRT, and LJT described above in paragraph 12, and each of said acts, occurring in conjunction with the operations of RGA, CRT, and LJT described above in paragraphs 2 and 3, constitute unfair labor practices affecting commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

25. The acts and conduct of RGA, CRT, and LJT described above in paragraph 15(a), occurring in conjunction with the circumstances described above in paragraphs 2, 4(c), (d), (e), (f), (g), 5(c), 8(a), 9(a), 11(a), 12(a), and 14(a), and in connection with the operations of RGA, CRT, and LJT described above in paragraphs 2 and 3, constitutes an unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

26. The conduct of RGA, CRT, and LJT described above in paragraph 15(a), occurring in conjunction with the circumstances described above in paragraphs 2, 4(b), 5(b), 8(b), 9(b), 11(b), 12(b), and 14(b), and in connection with the operations of RGA, CRT, and LJT described

above in paragraphs 2 and 3, constitutes an unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

27. The acts and conduct of MMP described above in paragraphs 18 and 20, and each of said acts, occurring in conjunction with the circumstances described above in paragraphs 2, 4(a), 5(a), 13 and 16, and in connection with the operations of RGA, CRT, and LJT described above in paragraphs 2 and 3, constitute an unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(A) and Section 2(6) and (7) of the Act.

28. The act and conduct of MMP described above in paragraphs 19, occurring in conjunction with the circumstances described above in paragraphs 2(a), 4(a), 5(a), 13 and 16, and in connection with the operations of RGA, CRT, and LJT described above in paragraphs 2 and 3, constitute an unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(A) and Section 2(6) and (7) of the Act.

PLEASE TAKE NOTICE that on the lst day of October, 1979, at 9:00 a.m., Pacific Daylight Savings Time, at a location to be designated hereinafter in San Francisco, California, a hearing will be conducted before a duly designated Administrative Law Judge of the National Labor Relations Board on the allegations set forth in the above Consolidated Complaint, at which time and place you will have the right to appear in person, or otherwise,

APPENDIX EXHIBIT K (PAGE 19 OF 19)

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and give testimony. Form NLRB-4668, Statement of Standard Procedures in Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Cases is attached.

YOU ARE FURTHER NOTIFIED that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, Series 8, as amended, each of the Respondents shall file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four (4) copies of an answer to said Consolidated Complaint within ten (10) days form the service thereof and that unless each does so, all of the allegations in the Consolidated Complaint shall be deemed to be admitted to be true with respect to that Respondent which fails to file an answer, and may be so found by the Board. Immediately upon the filing of its answer, each of the Respondents shall serve a copy thereof on each of the other parties.

DATED at San Francisco, California, this 25th day of June, 1979.

/ss/
NATALIE P. ALLEN

Regional Director
National Labor Relations Board,
Region 20
450 Golden Gate Avenue, Box 36047
San Francisco, California 94102

EXHIBIT L (PAGE 1 OF 8)

SETTLEMENT AGREEMENT DATED JUNE 28, 1979 BETWEEN CALRICE AND MEBA ET AL. (APPROVED BY NLRB JULY 18, 1979)

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

In re the matter of:

Rice Growers Association of California; California Rice Transport, Inc., a Wholly-Owned Subsidiary of Rice Growers Association of California; LJT Marine Services International, Inc.

Case No. 20-CA-14587

SETTLEMENT AGREEMENT [1]

The undersigned Charged Party and the undersigned Charging Party, in settlement of the above matter, and subject to the approval of the Regional Director for

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[1] This Settlement Agreement consisted of a fill-in-the-blanks type of preprinted NLRB form. The form is designed for use both in settlement of charges against an employer and in settlement of charges against a union. Accordingly, although this case involved charges against an employer (Calrice), there does appear some standard language which would only apply in the case of charges against a union. Although the distinction between the preprinted boilerplate language and the typed-in language would be clearly evident were the original document before this Court, due to the fact that the brief printing process does not distinguish between the preprinted matter and the typed-in matter, we include this explanation to avoid any possible confusion that might otherwise result.

APPENDIX EXHIBIT L (PAGE 2 OF 8)

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the National Labor Relations Board, HEREBY AGREE AS FOLLOWS:

POSTING OF NOTICE — Upon approval of this Agreement, the Charged Party will post immediately in conspicuous places in and about its plant/office, including all places where notices to employees/members are customarily posted, and maintain for a period of at least 60 consecutive days from the date of posting, copies of the Notice attached hereto and made a part hereof, said Notices to be signed by a responsible official of the Charged Party and the date of actual posting to be shown thereon. In the event this Agreement is in settlement of a charge against a union, the union will submit forthwith signed copies of said Notice to the Regional Director who will forward them to the employer whose employees are involved herein, for posting, the employer willing, in conspicuous places in and about the employer's plant where they shall be maintained for a period of at least 60 consecutive days form the date of posting.

COMPLIANCE WITH NOTICE — The Charged Party will comply with all the terms and provisions of said Notice.

BACKPAY — The Charged Party will make whole the employees named below by payment to each of them of the amount set opposite his or her name:

Peter D. Foti	Homer L. Oliver
Pete Pokrajac	Christopher Harlow
George Vesik	George Kim
Raymond Lidberg	Allen Sun Lean
Raymond C.S. Kim	Jack R. Poole
Calvin Hall	James Yakas

APPENDIX EXHIBIT L (PAGE 3 OF 8)

"Amount of backpay for each individual to be determined in accordance with standard Board procedure."

REFUSAL TO ISSUE COMPLAINT — In the event the Charging Party fails or refuses to become a party to this Agreement, then, if the Regional Director in his discretion believes it will effectuate the policies of the National Labor Relations Act, he shall decline to issue a Complaint herein (or a new Complaint if one has been withdrawn pursuant to the terms of this Agreement), and this Agreement shall be between the Charged Party and the undersigned Regional Director. A review of such action may be conducted pursuant to Section 102.19 of the Rules and Regulations of the Board if a request for same is filed within 10 days thereof. This Agreement is contingent upon the General Counsel sustaining the Regional Director's action in the event of a review. Approval of this Agreement by the Regional Director shall constitute withdrawal of any Complaint(s) and Notice of Hearing heretofore issued in this case.

PERFORMANCE — Performance by the Charged Party with the terms and provisions of this Agreement shall commence immediately after the Agreement is approved by the Regional Director, or, in the event the Charging Party does not enter this Agreement, performance shall commence immediately upon receipt by the Charged Party of advice that no review has been requested or that the General Counsel has sustained the Regional Director.

NOTIFICATION OF COMPLIANCE — The undersigned parties to this Agreement will each notify the Regional Director in writing what steps the Charged Party has taken to comply herewith. Such notification shall be

APPENDIX EXHIBIT L (PAGE 4 OF 8)

given within 5 days, and again after 60 days, from the date of the approval of this Agreement. In the event the Charging Party does not enter into this Agreement, initial notice shall be given within 5 days after notification from the regional Director that no review has been requested or that the General Counsel has sustained the Regional Director. Contingent upon compliance with the terms and provisions hereof, no further action shall be taken in the above case.

SIGNATURES:

RICE GROWERS ASSOCIAITON OF CALIFORNIA; CALIFORNIA RICE TRANSPORT, INC., A WHOLLY-OWNED SUBSIDIARY OF RICE GROWERS ASSOCIATION OF CALIFORNIA
(Charged Party)
By /ss/ Jack R. Murphy, Attorney
June 28, 1979

LJT MARINE SERVICES INTERNATIONAL, INC.
(Charged Party)
By: /ss/ James L. Peebles, Attorney
June 28, 1979

MARINE ENGINEERS BENEFICIAL ASSOCIATION, DISTRICT NO. 1, PCD, AFL-CIO; SAILORS UNION OF THE PACIFIC, SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO; MARINE COOKS AND STEWARDS UNION, SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO; PACIFIC COAST MARINE FIREMEN, OILERS, WATERTENDERS AND WIPERS ASSOCIAITON, SEAFARERS INTERNATIONAL UNION OF NORTH AMERICA, AFL-CIO
(Charging Party)
By: /ss/ Allan Brotsky, Attorney
June 28, 1989

RECOMMENDED:
By: /ss/ Alan D. Longman, NLRB Agent
June 28, 1979

APPROVED:
By: /ss/ Natalie P. Allen, NLRB Regional Director

APPENDIX EXHIBIT L (PAGE 5 OF 8)

NOTICE TO EMPLOYEES

POSTED PURSUANT TO SETTLEMENT AGREEMENT

APPROVED BY A REGIONAL DIRECTOR OF THE NATIONAL LABOR RELATIONS BOARD AN AGENCY OF THE UNITED STATES GOVERNMENT

CASE NO. 20-CA-14589

WE WILL withdraw and withhold recognition from International Organization of Masters, Mates and Pilots, herein called MMP, as the representative of our unlicensed seagoing employees or nonsupervisory licensed engineers aboard the Valerie F for purposes of collective bargaining or other mutual aid or protection unless and until such time as MMP is certified by the Board as the collective bargaining representative of said employees in an appropriate bargaining unit, pursuant to the terms of the Act.

WE WILL NOT give effect to our March 14, 1979 collective bargaining agreement with respect to nonsupervisory licensed engineers aboard the Valerie F or our March 22, 1979 collective bargaining agreement with respect to our unlicensed seagoing employees aboard the Valerie F, or to any renewal, extension, modification, or supplement to either of said agreements, but we are not required to withdraw or eliminate any wage rates or other benefits, terms and conditions of employment which we have given to said employees under either of said agreements.

APPENDIX EXHIBIT L (PAGE 6 OF 8)

WE WILL NOT assist or contribute support to MMP by granting any preference in hiring to its employee-members or to employees represented by it, or by recognizing or contracting with MMP as the bargaining representative of our unlicensed seagoing employees or nonsupervisory licensed engineers aboard the Valerie F unless and until it has been certified as the representative of said employees in an appropriate bargaining unit, pursuant to the terms of the At.

WE WILL NOT refuse to employ any of the below-named individuals, or any other employee, because of their membership in, activities on behalf of, or representation by, Sailors Union of the Pacific, herein called SUP, Marine Cooks & Stewards Union, herein called MCS, Marine Firemen's Union, herein called MFU, Seafarers INternational Union—Pacific District, herein called SIU-PD, or Marine Engineers Beneficial Associaiton, herein called MEBA:

Peter D. Foti	**Homer L. Oliver**
Pete Pokrajac	**Christopher Harlow**
George Vesik	**George Kim**
Raymond Lidberg	**Allen Sun Lean**
Raymond C.S. Kim	**Jack R. Poole**
Calvin Hall	**James Yakas**

WE WILL offer to employ the below-named individuals aboard the Valerie F in the former or substantially equivalent positions held by each of them prior to February 14, 1979, and we will make each of them whole for any loss of pay suffered by them as a result of our failure to employ them:

APPENDIX EXHIBIT L (PAGE 7 OF 8)

Peter D. Foti	Homer L. Oliver
Pete Pokrajac	Christopher Harlow
George Vesik	George Kim
Raymond Lidberg	Allen Sun Lean
Raymond C.S. Kim	Jack R. Poole
Calvin Hall	James Yakas

WE WILL, upon request, recognize and bargain collectively in good faith with SIU-PD and its constituent organizations SUP, MCS, and MFU as the bargaining representative of all employees in the bargaining unit described below, and, if an understanding is reached, embody it in a signed agreement. The bargaining unit is:

> All unlicensed seagoing employees employed on the Valerie F, excluding all licensed employees, staff officers, radio officers, concessionaires and their employees, musicians, doctors, doctors' assistants, nurses, hospital attendants, associate chief stewards, food controllers and auditors of suppliers together with their assistants and apprentices, animal tenders, nut turners, printers and their assistants, guards and supervisors as defined in the Act.

WE WILL, upon request, recognize and bargain collectively in good faith with MEBA as the bargaining representative of all employees in the bargaining unit described below, and, if an understanding is reached, embody it in a signed agreement. The bargaining unit is:

> All nonsupervisory licensed engineers employed on the Valerie F, excluding all other employees, guards and supervisors as defined in the Act.

APPENDIX EXHIBIT L (PAGE 8 OF 8)

/ss/ RICE GROWERS ASSOCIATION OF CALIFORNIA; CALIFORNIA RICE TRANSPORT, INC., A WHOLLY-OWNED SUBSIDIARY OF RICE GROWERS ASSOCIATION OF CALIFORNIA (EMPLOYER)

/ss/ LJT MARINE SERVICES INTERNATIONAL, INC.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days form the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be direct to the Board's Office at 450 Golden Gate Avenue, Box 36047, San Francisco, California 94102.

APPENDIX EXHIBIT M (PAGE 1 OF 5)

NLRB COMPLAINT FILED ON MAY 21, 1985 REGARDING UNFAIR LABOR PRACTICE CHARGES MADE BY EXPELLED MEBA MEMBER ALBERT R. WILLARD.

NLRB General Counsel, by
John D. Nelson, Regional Director
National Labor Relations Board, Region 19
2948 Federal Building, 915 Second Avenue
Seattle, Washington 98174

Filed May 21, 1985

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

District No. 1 — Pacific Coast District, Marine Engineers' Beneficial Association (Trinidad Corporation) and Albert R. Willard, an Individual	Case No. 19-CB-5469

COMPLAINT AND NOTICE OF HEARING

It having been charged by Albert R. Willard, an individual, herein called Willard, that District No. 1 — Pacific Coast District, Marine Engineers' Beneficial Association, AFL-CIO, herein called Respondent, has engaged in, and is engaging in, unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, *et seq.*, herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board,

APPENDIX EXHIBIT M (PAGE 2 OF 5)

on behalf of the Board, by the undersigned Regional Director for Region 19, acting pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, Series 8, as amended, hereby issues this Complaint and Notice of Hearing and alleges as follows:

1.

The Charge was filed by Willard on April 15, 1985 and was served on Respondent by certified mail on or about that date.

2.

(a) Trinidad Corporation (herein Trinidad) is a State of Delaware Corporation, with office and place of business in St. Louis, Missouri where it is engaged in the business of shipping.

(b) Trinidad, during the past twelve months, which period is representative of all times material herein, in the course and conduct of its business operations, had gross sales of goods and services valued at in excess of $500,000.

(c) Trinidad, during the past twelve months, which period is representative of all times material herein, in the course and conduct of its business operations, sold and shipped goods or provided services from its facilities within the State of Missouri, to customers outside the said state, or sold and shipped goods or provided services to customers within said state, which customers were themselves engaged in interstate commerce by other than indirect means, of a total value of in excess of $50,000.

(d) Trinidad, during the past twelve months, which period is representative of all times material herein, in the course and conduct of its business operations, purchased and caused to be transferred and delivered to its facilities

APPENDIX EXHIBIT M (PAGE 3 OF 5)

within the State of Missouri goods and materials valued at in excess of $50,000 directly from sources outside said state, or from suppliers within said state which in turn obtained such goods and materials directly from sources outside said state.

(e) Trinidad is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

4.[1]

At all times material herein, Willard occupied the position of first assistant engineer, and has been, and is now, a supervisor within the meaning of Section 2(11) of the Act and a representative of Trinidad for the purposes of collective bargaining or the adjustment of grievances.

5.

(a) On or about December 18, 1984 Respondent brought internal charges against Willard because Willard was working for Trinidad and refused to honor Respondent's request to cease his employment with Trinidad.

(b) On or about January 29, 1985, Respondent tried Willard, in absentia, on the charges referred to above in subparagraph (a).

(c) On or about April 4, 1985, Respondent expelled Willard from membership pursuant to the charges and trial referred to above in subparagraphs (a) and (b).

6.

By the acts described above in paragraph 5 and by each of said acts, Respondent did engage in, and is

[1] The complaint contained no Paragraph 3.

APPENDIX EXHIBIT M (PAGE 4 OF 5)

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engaging in, unfair labor practices affecting commerce within the meaning of Section 8(b)(1)(B) and Section 2(6) and (7) of the Act.

PLEASE TAKE NOTICE that on the 1st day of October 1985, at 9 a.m., in Room 3064, Jackson Federal Building, 915 Second Avenue, Seattle, Washington, a hearing will be conducted before a duly designated Administrative Law Judge of the National Labor Relations Board on the allegations set forth in the above Complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony. The hearing will continue on consecutive days thereafter until concluded. Form NLRB-4668, Summary of Standard Procedures in Formal Hearings Held Before the National Labor Relations Board in Unfair Labor Practice Proceedings Pursuant to Section 10 of the National Labor Relations Act, as amended, is attached.

YOU ARE FURTHER NOTIFIED that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, Respondent shall file with the undersigned Regional Director, acting in this matter as agent of the Board, an original and four (4) copies of an Answer to said Complaint within ten (10) days from the service thereof, and that, unless it does so all of the allegations in said Complaint shall be deemed to be admitted to be true and may be so found by the Board. Immediately upon the filing of its Answer, Respondent shall serve a copy thereof on each of the other parties.

APPENDIX EXHIBIT M (PAGE 5 OF 5)

DATED at Seattle, Washington, this 21st day of May 1985.

/ss/
JOHN D. NELSON

Regional Director
National Labor Relations Board, Region 19
2948 Federal Building, 915 Second Avenue
Seattle, Washington 98174

No. 89-193

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

DISTRICT NO. 1—PACIFIC COAST DISTRICT, MARINE ENGINEERS' BENEFICIAL ASSOCIATION, and NATIONAL MARINE ENGINEERS' BENEFICIAL ASSOCIATION, (AFL-CIO),

Petitioners,

v.

ROBERT N. FINNIE,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal of California, First Appellate District

---

PETITIONERS' REPLY MEMORANDUM

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Of Counsel

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-193

DISTRICT NO. 1—PACIFIC COAST DISTRICT, MARINE ENGINEERS' BENEFICIAL ASSOCIATION, and NATIONAL MARINE ENGINEERS' BENEFICIAL ASSOCIATION, (AFL-CIO),

Petitioners,

v.

ROBERT N. FINNIE,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeal of California, First Appellate District

---

PETITIONERS' REPLY MEMORANDUM

I.

Respondent Finnie concedes that the reasoning of the court below was "erroneous" and expressly disavows reliance on its theory on state court jurisdiction. Br. Opp. 3-4.[1] Under these circumstances, the most appropriate course is to grant the petition for certiorari and to vacate the judgment below for further consideration in light of Respondent's confession of error. This course would pre-

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[1] Throughout this Reply, "Pet." will refer to the Petition For Writ of Certiorari, and "Br. Opp." will refer to the Brief in Opposition to the Petition.

vent the anomalous result of allowing a judgment to stand which rests on a ground which both parties agree is unsound but would avoid a disposition which would have precedential weight if some state court were to assert jurisdiction on this theory in the future.

Yet Respondent urges that "if this Court is convinced for the reasons stated herein that the *result* below was correct, then it should deny certiorari, since however erroneous the reasoning below it was unpublished and therefore has no precedential value." Br. Opp. at 5, emphasis in original. Respondent thereby invites this Court to consider the factual and legal issues which he argues at great length and to do so without the benefit of an opinion by the Court of Appeals on these matters. This Court ordinarily prefers to decide issues only with the benefit of a lower court's analysis, even when these have been briefed on plenary consideration after review has been granted. *Cf. United States* v. *Sperry Corp.*, No. 88-952, decided November 28, 1989, slip op. at 13-14. For the Court to undertake such a task at the certiorari stage where only a very limited amount of time is available for each case is simply not feasible. On the other hand, Respondent would not be prejudiced by the course which we propose, since he would have a full opportunity to present his arguments to the Court of Appeal.

II.

For these reasons, we believe it inappropriate to address in detail the factual misstatements and legal arguments in Finnie's Opposition.[2] We are constrained to note

[2] In his Opposition, Finnie makes no response to the Unions' showing (at Pet. 6-14) that the *Garmon/Jones* preemption rule applies to this case. If Finnie had not confessed error, this lack of response would present a sufficient basis for summary reversal. Because Finnie did confess error with respect to the lower court's decision, however, the proper and most efficient course is for this Court to vacate the California Court of Appeal's ruling and remand to that court for further consideration.

briefly, however, that the facts he asserts and the arguments he advances are incorrect. In particular, Finnie repeatedly asserts that he ceased working for Calrice for "personal reasons" having "nothing to do with" the Unions' "threat of discipline," or "for reasons wholly unrelated to * * * the underlying labor dispute," that there was "no coercion or pressure, either direct or indirect, placed upon [Calrice] to fire Finnie," such that the Unions' conduct could not even arguably violate Section 8(b)(1)(B). Br. Opp. at 9.[3] Finnie's own admissions below show that just the reverse is true. In his "Declaration" filed in 1981 in support of his Petition (p. 1a *infra*), Finnie stated "under penalty of perjury" that (1) he left the vessel as a direct result of MEBA pressure associated with the underlying labor dispute; (2) the Unions placed "severe pressure" on Calrice while Finnie was employed by Calrice; (3) but for the Unions' pressure he would have continued working for Calrice; (4) Calrice replaced Finnie and the rest of the MM&P crew as a result of the MEBA; and (5) he was forced to take lower paying jobs and thus lost money as a result of the Unions' pressure:

> • In the summer of 1979 the jurisdictional dispute between MEBA and the MMP was resolved by the [NLRB]. The NLRB ruled in favor of MEBA, and the 'VALERIE F' now sails with a MEBA contract. *If I had not been expelled, I could have*

---

[3] Finnie also totally misconstrues the Unions' position with respect to their "arguable" violation of Section 8(b)(1)(B). Contrary to Finnie's claim, the Unions have not argued "that [they] committed an illegal and prohibited act in disciplining Finnie." Br. Opp. at 1, fn. 1. Rather, the Unions' position is that the NLRB is the exclusive forum chosen by Congress to adjudicate conduct which arguably violates Section 8(b)(1)(B), and that this claim can be heard only by the NLRB. Before the Board, the Unions would argue that their conduct, while "arguably" prohibited for purposes of preemption analysis, did not run afoul of Section 8(b)(1)(B).

continued with the 'VALERIE F' as a MEBA chief engineer at the above-noted salary of $62,000 to $71,000 per year." (p. 2a *infra*) (emphasis added).

- I left the 'VALERIE F' immediately upon its arrival in San Francisco on May 12, 1979. *I did so because of the severe pressure by MEBA upon me and her owners* and as a result of my fear of violence if I continued with her. * * * (p. 2a *infra*) (emphasis added).
- I have suffered a severe diminution in my earning capacity as a result of my expulsion from MEBA. In the two non-MEBA jobs I have held since leaving the 'VALERIE F' *I have earned far less that I could have earned had I remained a MEBA member in good standing and stayed aboard the 'VALERIE F'."* (pp. 2a-3a *infra*) (emphasis added).

Indeed, Finnie himself concedes that: *"If in fact the Union had 'successfully pressured Calrice to replace him,' there is no question but that this would be a preempted Section 8(b)(1)(B) unfair labor practice."* (emphasis added). Br. Opp. at 19, fn. 14. In view of Finnie's own admission that the Union did just that, the trial court was correct when it determined that Finnie's lawsuit challenging MEBA's conduct was preempted.

Finnie's legal arguments are likewise unfounded. Finnie endeavors to distinguish *American Broadcasting Cos. v. Writers Guild*, 437 U.S. 411, placing great emphasis on the fact that Finnie "resigned from Calrice for unrelated reasons," and therefore the "potential for future divided loyalty, i.e. coercion in the employer's ability to freely select loyal supervisors, was not present in Finnie's case." Br. Opp. at 25. But, as we have shown, Finnie admits that he left the vessel solely because of the Unions' pressure on him and Calrice, and that the Unions' coercion affected his future "willingness to serve" as a

supervisor for Calrice.[4] *See Writers Guild*, 437 U.S. at 436. Thus, under *Writers Guild*, Finnie's action is preempted.

Finnie's reliance on *NLRB* v. *Electrical Workers*, 481 U.S. 573, is similarly unavailing. Finnie reads *Electrical Workers* as requiring a finding of actual "tangible" coercion by the union to make out a Section 8(b)(1)(B) violation. While we do not agree with Finnie's reading of *Electrical Workers*, it is sufficient to note that even under Finnie's reasoning his action would be preempted, because Finnie's own Declaration expressly states that he was forced off his job because of union pressure on him and his employer, and that such union coercion prevented him from continuing as a supervisory grievance-adjuster with that employer.[5]

---

[4] Despite his allegations to the contrary (Br. Opp. at 29, fn. 27), Finnie's factual and legal admissions—that the Unions interfered with his contractual relationship with this employer and that such conduct affected his employer's Section 8(b)(1)(B) right to select grievance-adjusters—place his case on all fours with *Operating Engineers* v. *Jones*, 460 U.S. 669 at 679, 683.

[5] The grounds stated in the text are sufficient to dispose of Respondent's reliance on *Electrical Workers*. We note, however, that Finnie merely assumes, but does not demonstrate, that this 1987 decision can sustain state court jurisdiction over his Petition. While the issue has never been expressly addressed by this Court, the *Garmon* rationale seems to require the opposite conclusion. "In the absence of the Board's clear determination that an activity is neither protected nor prohibited or of compelling precedent applied to essentially undisputed facts, it is not for this Court to decide whether such activities are subject to state jurisdiction." *San Diego Unions* v. *Garmon*, 359 U.S. at 246 (1959). Even if, contrary to our submission, *Electrical Workers* constitutes such "clear precedent" *now*, in 1979 when Respondent's claim arose and in 1981 when he invoked state court jurisdiction (we think the former is more pertinent), it was clearly arguable that the Unions had violated § 8(b)(1)(B). Indeed, as late as 1985, the NLRB General Counsel issued a § 8(b)(1)(B) complaint in almost identical circumstances. See Pet. 10 and n.7. Thus, Finnie was required to follow the NLRA administrative scheme available to him. *Operating Engineers* v. *Jones*, 460 U.S. at 680-81.

CONCLUSION

For the foregoing reasons, and those set forth in our Petition, this Court should grant the Petition for Writ of Certiorari, vacate the decision below, and remand the matter to the California Court of Appeal for reconsideration. In the alternative, this Court should summarily reverse the decision below.

Respectfully submitted,

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Attorneys for Petitioners

DICKSTEIN, SHAPIRO & MORIN
Of Counsel

Dated: November 30, 1989

APPENDIX

IN THE SUPERIOR COURT
FOR THE STATE OF CALIFORNIA
IN AND FOR THE CITY AND COUNTY
OF SAN FRANCISCO

No. 780847

[Filed May 29, 1981]

ROBERT N. FINNIE,
Petitioner,

vs.

DISTRICT NO. 1—PACIFIC COAST DISTRICT,
MARINE ENGINEERS BENEFICIAL ASSOCIATION; and
NATIONAL MARINE ENGINEERS BENEFICIAL ASSOCIATION
(AFL-CIO),
Respondents.

Declaration of Robert N. Finnie
In Support of Petition for
Writ of Mandate and Award of Damages

* * * *

I, Robert N. Finnie, declare:

I am 60 years of age. I am a licensed marine engineer and am qualified as a chief marine engineer. I am the petitioner in the above-entitled action.

* * * *

During the 53 days I was aboard the "VALERIE F" I earned over $18,000. Had I been able to keep the job,

I would have been able to earn between $62,000 to $71,000 per year, even only working six to seven months per year (as is the custom with marine engineers).

I left the "VALERIE F" immediately upon its arrival in San Francisco on May 12, 1979. I did so because of the severe pressure by MEBA upon me and her owners and as a result of my fear of violence if I continued with her.

In the summer of 1979 the jurisdictional dispute between MEBA and thhe MMP was resolved by the National Labor Relations Board. The N.L.R.B. ruled in favor of MEBA, and the "VALERIE F" now sails with a MEBA contract. If I had not been expelled, I could have continued with the "VALERIE F" as a MEBA chief engineer at the above-noted salary of $62,000 to $71,000 per year.

When I left the "VALERIE F" on May 12, 1979, it seemed even then that there was no likelihood I could obtain MEBA employment, in view of the clearly hostile attitude toward me exhibited by the mob picketing the ship's arrival.

And after my expulsion at the New Orleans trial on July 9, 1979, it was absolutely clear that I could not obtain MEBA employment.

Being deprived of the benefits of membership in MEBA means that the overwhelming majority—in the neighborhood of 90%—of the available marine engineer positions in the country are foreclosed to me, because the overwhelming majority of marine engineer contracts are held by MEBA.

I have suffered a severe diminution in my earning capacity as a result of my expulsion from MEBA. In the two non-MEBA jobs I have held since leaving the

"VALERIE F" I have earned far less than I could have earned had I remained a MEBA member in good standing and stayed aboard the "VALERIE F".

My first job after leaving the "VALERIE F" was with American Pacific Container Line, from May 15, 1979 to March 31, 1980. This was a non-MEBA job. I worked for them first as a shore-based engineering consultant and then as a shore-based salaried engineer. I was paid at the rate of approximately $26,500 per year in both capacities. Thus my salary with them was approximately $44,500 per year less than what I could have earned aboard the "VALERIE F" had I not been wrongfully expelled from MEBA.

My second job after leaving the "VALERIE F" was, and still is, with the U.S. Army Corps of Engineers as chief engineer on a dredge, from April 1, 1980, to the present.

* * * *

I declare under penalty of perjury that the foregoing is true and correct, except as to those matters stated therein on information and belief, and as to those matters I believe them to be true.

Executed at San Francisco, California on May 21, 1981.

/s/ _____

ROBERT N. FINNIE